IN THE UNITED STATES DISTRICT COURT IN AND
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHILDRENS MEDICAL CENTER, INC., a non-profit hospital corporation, Plaintiff,	)	
vs.	)	No. 79-C-157C
FRANK L. CONLEY; FRANK FADDY and LOIS FADDY, husband and wife, Defendants.	)	

FILED

OCT 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT BY AGREEMENT

NOW before the Court is the proposed Judgment to be entered by virtue of an agreement of settlement between all of the parties. The Court, having examined the proposed Judgment and Court file herein, and being fully advised in the premises, finds as follows:

THAT this is an action in interpleader brought by the Plaintiff, Childrens Medical Center, Inc., wherein the amount in controversy (stake) is $12,796.28. The Defendant, Frank L. Conley, is a resident of Colorado. The Defendants, Frank Faddy and Lois Faddy, husband and wife, are residents of Oklahoma. By virtue of the amount in controversy and 28 U.S.C. §1335, the Court has subject matter jurisdiction over this action.

THAT each of the Defendants has been personally served with a copy of the Petition by the United States Marshal, and each has entered an answer herein, thus vesting the Court with personal jurisdiction over each of the parties.

THAT from September 28, 1977 until March 25, 1978, David M. Conley, the natural son of Frank L. Conley and Lois Faddy, and the stepson of Frank Faddy, received psychiatric and medical care at the Plaintiff hospital in Tulsa, Oklahoma.

THAT the charges for the medical and psychological care to David M. Conley resulted in payment to the Plaintiff hospital by the health insurance carriers of Frank L. Conley and Frank Faddy and Lois Faddy. Blue Cross and Blue Shield of New Jersey and Oklahoma made payments as Frank L. Conley's insurer and Aetna Insurance Company made payments as insurer of Frank Faddy and Lois Faddy. Said payments by two different insurance companies resulted in overpayment of the medical charges in the amount of $12,796.28, which amount constitutes the stake in this action and which amount has, by prior agreement of the parties, been paid by the Plaintiff to the following Defendants and in the following amounts:

Frank L. Conley	$4,862.59
Frank Faddy and Lois Faddy, husband and wife,	7,933.69

and, as evidenced by their signatures hereon, and by acceptance of the respective amounts of monies set forth herein have agreed to accept said amounts in full and complete satisfaction of their claims herein and to release Plaintiff from all liability to the Defendants, respectively, regarding the overpayments (stake) upon which this action is based.

THAT, the Plaintiff has agreed to pay the filing and court costs herein and each of the parties have agreed to pay their separate attorney fees which agreement the Court finds to be reasonable and acceptable.

THAT all parties agree that Plaintiff need not deposit any sums of money with this Court at this time or at any time in the future for the benefit of the Defendants for the reason that Plaintiff has paid out in full all amounts due and owing to the Defendants heretofore by separate cashier's checks (Exhibit "A" and "B").

THAT, as alleged by Plaintiff, the two insurance companies disclaim all interest in the overpayment; that this action was brought by the Plaintiff so that the respective rights of the Defendants in and to the overpayment could be determined; and, so that Plaintiff's liability to the Defendants in regard to the overpayment could be adjudicated.

THAT by reason of the fact that the amount in controversy (stake) of $12,796.28 having previously been paid to the Defendants by the Plaintiff this matter is now moot and, by agreement of the parties, may be dismissed by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the agreement of the parties as set forth in the findings of this Court should be and the same is hereby deemed to be reasonable by this Court and is accepted and each of the parties being in agreement thereof as evidenced by their signatures hereon.

THAT IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall be discharged from all liability to the Defendants regarding the overpayment (stake) upon which this action is based.

THAT IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff will satisfy the filing and court costs herein and that each party shall bear and pay their respective attorney fees, if any, incurred herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause, now moot, should be and the same is hereby dismissed.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK FADDY

LOUIS FADDY

RANDOLPH L. STRNAD
900 World Building
Tulsa, Oklahoma 74103
(918) 587-0000
Attorney for Defendants
Frank Faddy and Lois Faddy

FRANK L. CONLEY

ROBERT A. LEHMAN
2401 East Second Avenue
Denver, Colorado 80206
Attorney for Defendant
Frank L. Conley

CHILDRENS MEDICAL CENTER, INC.

By _____
LOUIS LEVY
5200 South Yale
Suite 100
Tulsa, Oklahoma 74135
(918) 622-8350
Attorney for Plaintiff
Childrens Medical Center, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANCIS OIL AND GAS, INC., Plaintiff,	)	
vs.	)	No. 77-C-161-D
EXXON CORPORATION, Defendant.	)	

FILED
OCT 29 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration the Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Judgment on the Pleadings. Arguments were heard before the Magistrate on July 5, 1978. The Court has reviewed the entire file, including the Findings and Recommendations of the Magistrate and the parties' objections and accompanying briefs, and, being fully advised in the premises, finds:

This is a diversity action under 28 U.S.C. §1332 for breach of contract for the sale of crude oil. Plaintiff is the owner of unitized oil and gas leases located within Tract 117 of the Yates Field Unit in Pecos and Crockett Counties, Texas. Throughout the period from July 1, 1976, to March 31, 1977, Defendant purchased all of the Unit's crude oil production which was allocated to Plaintiff's leases. Plaintiff claims that it is owed $103,449.57 for oil sold to Defendant during such period, whereas Defendant has paid only $90,015.47, leaving a balance of $13,434.10 owing to Plaintiff.

Plaintiff bases its motion for Summary Judgment on the grounds that it owned and sold to Defendant the amounts of lower tier, upper tier, and imputed stripper well crude oil described in the monthly certifications delivered by Plaintiff to Defendant. Plaintiff argues that there is no material issue of fact concerning Defendant's liability for the

underpayment because the crude oil purchase agreement between Plaintiff and Defendant required Defendant to pay its posted price for the lower tier, upper tier and imputed stripper well crude oil allocated from Unit production to Plaintiff's leases; that it owned the amounts of lower tier, upper tier, and imputed stripper well crude oil which it certified to Defendant, and it is entitled to payment upon that basis.

Francis determined its share of the Unit's imputed stripper well crude oil, upper tier oil, and lower tier oil for purposes of its certifications by characterising its share of Unit production as imputed stripper well crude oil to the extent of its deemed contribution to the Unit's imputed stripper well crude oil for that month, and allocated the remainder of its production share between upper tier and lower tier oil in the same proportion that total Unit upper tier and lower tier oil bore to one another. Exxon contends that the value of Francis' monthly share of Unit production is to be calculated simply by allocating to Francis a share of the Unit's imputed stripper well crude oil, upper tier oil and lower tier oil based upon Plaintiff's Tract Participation as provided in the Unit Agreement and Unit Operating Agreement.

The Court will first direct its attention to Defendant's Motion for Judgment on the Pleadings. In its motion, Defendant, pursuant to Rules 12(c), 12(h)(2) and 19(b), moves the Court to "dismiss this action on the grounds that all the Working Interest Owners on the Yates Field Unit . . . who are not presently before this Court are indispensable parties, many of whom cannot be made parties hereto without depriving this Court of jurisdiction." This Court would be deprived of jurisdiction, Defendant asserts, because many of these indispensable parties are citizens of Oklahoma, and their joinder would destroy diversity. In suppport of this assertion,

Defendant offers the affidavit of Marvin L. Cogdill, Manager-Production Economics Branch, of Phillips Petroleum Company. The affidavit states that Phillips is the owner of the working interest in a tract of the Yates Field Unit, and sells crude oil allocated to its tract to Defendant. The corporate offices and principal place of business of the Phillips Petroleum Company are in Bartlesville, Oklahoma.

Plaintiff, in response to Defendant's motion, argues that Defendant has failed to sustain the burden of proof required of it to show that the other interest owners are indispensable as contemplated by Rule 19. Plaintiff argues that Defendant has failed to establish:

> (a) that, in the absence of the working interest owners, complete relief could not be afforded Francis or Exxon, or
>
> (b) that the working interest owners' ability to protect their interests would, as a practical matter, be impaired, or
>
> (c) that, in the absence of the working interest owners, a decision on the merits would leave Exxon subject to a substantial risk of inconsistent obligations.

Plaintiff's Memorandum Brief in Opposition to Defendant's Motion for Judgment on the Pleadings at 19.

Plaintiff further urges that the Court should not dismiss this action under Rule 19 even if the working interest owners are found to be parties to be joined if feasible because Exxon has failed to prove:

> (a) that judgment rendered in the absence of the working interest owners would be prejudicial to either Exxon or the working interest owners, or
>
> (b) that a judgment rendered in the absence of the working interest owners would not be adequate, or
>
> (c) that Francis would have an equally adequate forum in another court.

Id.

The Magistrate, in his Findings and Recommendations, agreed with Plaintiff and concluded that Defendant had

failed to meet its burden of showing that Phillips and other parties should be joined. The Magistrate further concluded that the case of Bloch v. Sun Oil Corp., 335 F.Supp. 190 (W.D.Okla. 1971) was distinguishable from the instant action. The Court does not believe that Bloch can be so readily distinguished from the present case.

In Bloch, supra, the defendants moved to dismiss for nonjoinder of other oil companies in the action. The action had been brought by the lessors of the property for royalties allegedly owing on valuable by-products from the oil and gas production. These by-products were being sold by defendants. The leases in dispute between the plaintiffs and defendants described the basis upon which royalties were to be computed. Identical or similar language was used in other leases used in the same area by other oil companies which were not joined as parties. The defendants argued that a holding that a defendant lessee was liable for additional royalties would directly affect other lessees in the same unit. Plaintiffs contended that the effect on absent, non-diverse lessees would be remote and minor, since they would not be bound by such a construction. The absent lessees did not claim any interest in the transaction which was the subject matter of the action. The Court, recognizing that an adjudication in that case would not constitute res judicata noted:

> Herein lies the basic problem raised by the absentee's non-diversity; their interests are too close to the subject matter of this action to be unaffected thereby in a practical sense, but not close enough to be affected in law.

335 F.Supp. at 195. The Court went on to conclude that the danger of prejudice to the absentees arose from the practical effect of any decision as precedent. Bloch does not, as Plaintiff suggests, stand for the principle that danger of an adverse precedent alone is sufficient to fulfill Rule 19(a)(2)(i). Bloch does stand for the proposition that

under Rule 19, the courts are not to decide questions through the application of labels or mechanical rules, but are to use practical considerations on a case by case basis, and in some cases, the danger of adverse precedent is sufficient to require dismissal under Rule 19.

In proceeding under Rule 19, the Court must first examine the factors of subpart(a), and, if it concludes that the absentees are persons who should be joined if feasible, proceed only then to the considerations of subpart (b) to determine if the action should continue in their absence. See 7 Wright & Miller §§1604, 1607, 1608. Rule 19(a) provides, in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

The absentees in this case do not fall within subpart (1) of Rule 19. Complete relief can be accorded as between Francis Oil and Gas and Exxon. Francis seeks a money judgment only. With respect to this factor, the Court is in agreement with the Findings and Recommendations of the Magistrate.

Subpart (2)(i) requires the Court to examine the relationship of the absentees to the present action and the effect, in practical terms, upon them of any decision. The interest of the absentees in this case is not in the purchase agreement executed by Francis and Exxon, but in the Unit Agreement covering the Yates Field Unit in Pecos and Crockett Counties, State of Texas. This agreement purports to control the division of the production from the Unit among the participants. Plaintiff and Defendant differ as to the

effect of this agreement on the division of imputed stripper oil produced from the unit. If Plaintiff were to prevail, it would gain the benefits from more of this stripper oil that it is now receiving (Plaintiff essentially contends that it is entitled to the benefits from all the stripper oil produced from its tract prior to unitization). Since a finite amount of oil is produced from the Unit, and its division between stripper, upper tier, and lower tier is controlled by Federal Regulations, a gain to those participants in a position similar to Plaintiff's would necessarily diminish the benefits to those participants favored by the formula which Defendant supports. Although the Unit Agreement is not the direct subject of this dispute, its construction and interpretation is necessarily involved in determining the rights and liabilities of Francis and Exxon.

While it is true that under ordinary circumstances a person does not become indispensable to a contract action simply because that person's rights under an entirely separate contract will be affected, see, e.g., Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Centers, Inc., 564 F.2d 816 (Eighth Cir. 1977), the relationship in this case between the disputed contract to purchase, the Unit Agreement, and other contracts to purchase is such that as a practical matter a decision concerning one affects all. As in the Bloch case, supra, this Court, after having interpreted the relevant contracts, would lose control over the use to which its decision is put in subsequent actions, if any. The Court, looking to the realities of the situation, concludes that any determination by this Court would, as a practical matter, impede and impair the ability of the absentees to protect their interests.

Rule 19(a)(2)(ii) directs the Court to examine whether disposition of the action without the absentees would leave any of the parties to the action exposed to a substantial

risk of incurring double, multiple or inconsistent obligations.

Defendant contends that the affidavits of Marvin L. Cogdill of Phillips Petroleum and Robert T. Parker, of Exxon, show that Phillips is now being benefitted by the present system of allocation, that is, the system endorsed by Exxon and attacked by Francis. Defendant argues that if it loses the present action, it (as well as all purchasers from the Unit) will be faced with a dilemma. It argues that it will not know whether it is to pay all working interest owners under the system supported by Francis, or whether to pay all except Francis by the existing formula. Exxon contends that depending upon which course it chooses, it will either risk enforcement action by the Federal Energy Regulatory Commission for having been involved in the sale of more stripper oil from the Yates Field than is permitted by regulation or actions by other working interest holders, of which Phillips is an example, who are benefitted by the present formula.

The present case, should it proceed in the absence of the other working interest owners, would, of course, have no res judicata effect upon them. Any decision of this Court would have only precedential value in subsequent suits. A certain construction or interpretation of any contract language by this Court would not prevent another court, in an action involving the absentees, from placing a different interpretation upon the language, thus risking inconsistent results and therefore inconsistent obligations on the part of Defendant. The question of what is a "substantial" risk cannot be determined by rigid rules, but will of necessity vary with the circumstances. The pragmatic approach directed by Rule 19 requires that "substantial" be given its ordinary meaning. Morgan Guaranty Trust Co. v. Martin, 466 F.2d 593 (Seventh Cir. 1972). Rule 19(a)(2)(ii) necessarily requires

that the Court's view be prospective. While the mere theoretical possibility of inconsistent or multiple liability is insufficient to satisfy this subpart, see Morgan Guaranty Trust Co., supra, the movant need not show that it will be subject to inconsistent liabilities with a certainty. See Window Glass Cutters League of America AFL/CIO v. American St. Gobain Corp., 47 F.R.D. 255 (W.D.Pa. 1969), aff'd, 428 F.2d 353 (Third Cir. 1970). In determining the substantiality of the risk, the Court should assess the liklihood of absent parties bringing suit and prevailing against the defendant. deVries v. Weinstein International Corp., 80 F.R.D. 452 (D.Minn. 1978). Viewing the situation presented in the instant case in its entirety, it appears that proceeding in the absence of the other working interest owners will subject Defendant to this risk.

Under the circumstances of this case, the Court is of the opinion that the absent owners of working interests in the Yates Field are "persons to be joined if feasible" under Rule 19(a), Fed.R.Civ.P.

In response to the Court's inquiry, the parties involved herein filed, on August 30, 1979, a letter to the Court wherein the identities of the absent working interest owners were set out, along with their respective shares in the unit. It is evidently Defendant's contention that among these absentees, some will be favored by the formula espoused by Defendant, while others may be favored by Plaintiff's formula. Defendant argues specifically that Phillips Petroleum Company, one of the absentees, is favored by Defendant's formula, and would logically be aligned as a party defendant since its economic interests in terms of the division of production are opposed to Plaintiff's. Therefore, this Court would lose jurisdiction if such joinder were accomplished, as it would destroy diversity. Although no argument is made as to the possible alignment of the other absentees, one

non-diverse defendant would suffice to oust this Court of jurisdiction. Strawbridge v. Curtiss, 7 U.S. (3 Cranch.) 267 (1806). Since these circumstances make the joinder of the absentees not feasible, the Court must proceed to the analysis required by paragraph (b) of Rule 19. Manygoats v. Kleppe, 558 F.2d 556 (Tenth Cir. 1977); Wright v. First National Bank of Altus, Oklahoma, 483 F.2d 73 (Tenth Cir. 1973). If these absentees are found to be indispensable under Rule 19(b), the Court would then have to dismiss this case, e.g., Schutten v. Shell Oil Co., 421 F.2d 869 (Fifth Cir. 1970). In analyzing this situation under Rule 19(b), however, it must be kept in mind that the "philosophy of the . . . rule is to avoid dismissal whenever possible." 7 Wright & Miller §1604, at 45. See also Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

In determining whether it would be equitable and just to proceed without the absentees, the Court must consider all the circumstances of the case, including, but by no means limited to, those enumerated in Rule 19(b). Provident Tradesmen's Bank v. Patterson, supra, at 118-119; Schutten v. Shell Oil Co., supra at 873.

The first factor to be considered under Rule 19(b) requires the Court to determine "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." This factor reiterates to some extent portions of part (a)(2) of Rule 19; and the circumstances considered in determining whether the absentees are persons to be joined are, in large measure, applicable to this determination as well, see generally 7 Wright & Miller §1608; 3A Moore's Federal Practice §19.07-2[1]. The general policy of Rule 19 requires that the Court look to the practical prejudice to absentees or parties, e.g., Bloch v. Sun Oil Corp., supra. The Court has already discussed at length the possibility of inconsistent interpretations of the documents involved

herein, and the fact that the rights of all of the participants in the Yates Unit derive their respective obligations and benefits from the same, or essentially similar, documents. The Court recognizes that any interpretation placed upon those intruments by it would have an influence upon any future proceedings. In a real and practical sense, the absentees would be prejudiced were this case to proceed.

Related to the first factor is the second, which directs the Court to consider whether the prejudice to absentees or parties can be lessened by the shaping of relief. The Plaintiff herein seeks monetary relief; the problem is not with the prejudicial effect of the relief sought, but rather is the prejudicial effect of the determinations which must be made in deciding whether relief is warranted. The situation is closely akin to the one which was before the Court in Bloch v. Sun Oil Corp., supra. A judgment of this Court will not be binding on absentees, so any limitations attempted will be useless as to them. As has been discussed above, this Court's construction of the language of any instrument before it has only a limited precedential effect. There is no way to control its influence of lack of influence upon other courts. The Court concludes that there is no way to limit the prejudicial effect of a judgment in this case.

The third factor questions whether a judgment rendered without the absentees will be adequate. There is no doubt that judgment in this case will be adequate as between Francis and Exxon; Exxon will either have to pay additional money to Francis or it will not, and the presence of other working interest owners has no effect in this respect.

The fourth factor requires the Court to balance the interests of the Plaintiff against those of the Defendant and the absentees. If dismissal would leave the Plaintiff without an adequate remedy, conscience and equity dictate that it is preferrable under some circumstances to proceed

without the absentees, e.g., Provident Tradesmen's Bank v. Patterson, supra; Fouke v. Schenewerk, 197 F.2d 234 (Fifth Cir. 1952); see also 3A Moore's Federal Practice ¶19.07-2[4]. The Yates Field Unit is located in Pecos and Crockett Counties, State of Texas. The owners of working interests in this field are "doing business" within the State of Texas and would presumably all be subject to service. All of the affected parties could be joined in an action brought in a Texas state court, and any dangers of subsequent litigation, and inconsistent judgments or interpretations thereby avoided. While it is true that Plaintiff has the initial right to select the forum, this right must give way under certain circumstances, e.g., Schutten v. Shell Oil Co., supra; Ramsey v. Bomin Testing, Inc., 68 F.R.D. 335 (W.D.Okla. 1975). Were this dispute settled in one action, with all the affected parties before the court, the Plaintiff would still be able to receive an adequate remedy, the risk of inconsistent obligations on the Defendant would be eliminated, the risk of subsequent litigation would be eliminated, and the public's interest in economy of litigation and the conservation of judicial resources would be promoted.

From its consideration of all the circumstances of this case, the Court is of the opinion that the absent working interest owners are indispensable parties, and that equity and conscience require that this action not proceed without them. It is unnecessary, because of this determination, to reach the issues presented by Plaintiff's motion for summary judgment.

IT IS THEREFORE ORDERED that Defendant's Objections to the Findings and Recommendations of the Magistrate be sustained, and that this action be, and the same hereby is, dismissed without prejudice.

It is so Ordered this 29th day of October, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
BETTY A. FLUTE, Defendant.	)	CIVIL NO. 79-C-584-D

FILED
OCT 29 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 29 day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Betty A. Flute, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Betty A. Flute, was personally served with Summons and Complaint on September 15, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Betty A. Flute, for the sum of $808.41, as of August 25, 1979, plus interest from and after said date at the rate of 7% per annum.

Thos. R. Brett
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

L. D. WELLS,

Plaintiff,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, a corporation,

Defendant.

No. 79-C-567-D

FILED

OCT 29 1979

U. S. DISTRICT COURT

ORDER SUSTAINING
MOTION TO QUASH AND TO DISMISS

Now on this 29 day of October, 1979, the Court examines the file in the above referenced action, and finds that General American Life Insurance Company has filed a Motion to Quash, or in the alternative, a Motion to Dismiss, which motions are supported by an Affidavit attesting that General American Life Insurance Company was not served with summons according to law. The Court also finds that the Plaintiff has consented to the grant of the Motion to Quash.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Quash of General American Life Insurance Company be and it is granted, and that this case shall be dismissed for lack of service, without prejudice to refiling by the Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the other issues raised in the Motion to Dismiss by General American Life Insurance Company need not be determined because of the dismissal of this action.

DISTRICT JUDGE

APPROVED:

David B. McKinney, Attorney for
General American Life Insurance Company

L. D. Wells

L. D. Wells

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
ELGER F. WALLACE, Defendant.	)	CIVIL ACTION NO. 79-C-579-D

DEFAULT JUDGMENT

This matter comes on for consideration this 29 day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Elger F. Wallace, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Elger F. Wallace, was personally served with Summons and Complaint on September 15, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Elger F. Wallace, for the sum of $978.75, as of August 30, 1979, plus interest from and after said date at the rate of 7% per annum.

S/ FRED DAUGHERTY

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 29 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
RICHARD O. DAVIS, Defendant.	)	CIVIL ACTION NO. 79-C-603-D

DEFAULT JUDGMENT

This matter comes on for consideration this 29 day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Richard O. Davis, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Richard O. Davis, was personally served with Summons and Complaint on September 25, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Richard O. Davis, for the sum of $765.60, plus interest at the legal rate from the date of this Judgment.

Dale Daugherty
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DON C. WRIGHT and NATIONAL PAWNBROKERS, INC., a Corporation, Petitioners, vs. DEPARTMENT OF THE TREASURY, Bureau of Alcohol, Tobacco, and Firearms, and the UNITED STATES, Respondents.	)	CIVIL ACTION NO. 79-C-484-D

FILED
OCT 29 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Now on this 29 day of October, 1979, there came on for consideration the Stipulation For Dismissal executed by the parties herein. The Court approves said Stipulation, and

IT THEREFORE, ORDERED, ADJUDGED, and DECREED that this action be and the same is hereby dismissed, without prejudice.

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD L. WINDER, Plaintiff,	)	
v.	)	No. 79-C-55-B
SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri corporation, Defendant.	)	

FILED
OCT 29 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

The above-styled cause having come before the Court upon the Stipulation for Dismissal executed by all parties, it is

ORDERED that the above-styled cause be dismissed with prejudice to a future action, each party to bear its own costs.

DATED this 29 day of October, 1979.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KIN-ARK CORPORATION,
a Delaware Corporation,

Plaintiff,

-vs-

W. M. (PAT) BOYLES, WALTER M. BOYLES, LARRY L. BOYLES, and SANDRA J. BOYLES,

Defendants.

No. 74-C-389-C

FILED
OCT 29 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

NOW on this 19th day of October, 1979, the above styled cause comes on for hearing before the Court upon the matter of contempt of the defendant, W. M. (Pat) Boyles; the plaintiff's application for attorneys fees; the defendant's application for attorneys fees; and upon the application of the plaintiff for an order of this Court ordering and directing the defendant, W. M. (Pat) Boyles, to transfer property to the plaintiff in partial satisfaction of plaintiff's judgment. Plaintiff appears through its attorneys, Jones, Givens, Brett, Gotcher, Doyle & Bogan, Inc., by Rodney A. Edwards, and Nathan Hecht of the law firm of Locke, Purnell, Boren, Laney & Neely of Dallas, Texas. The defendant, W. M. (Pat) Boyles, appears through his attorney, G. Michael Lewis of the law firm of Doerner, Stuart, Saunders, Daniel & Anderson. The Court, having heard evidence previously presented to the Court, having reviewed the authorities presented by counsel for the parties and having considered the arguments and statements of counsel, finds as follows:

I.

That the plaintiff's application for attorneys fees by reason of the contemptuous conduct of the defendant, W. M. (Pat) Boyles, should be sustained and counsel for the plaintiff be awarded fees in the sum of Four Thousand Three Hundred Thirty-Two Dollars ($4,332.00) together with reasonable costs expended of Eight Hundred Eighty Dollars and Fifty-Nine Cents ($880.59) for a

total judgment of Five Thousand Two Hundred Twelve Dollars and Fifty-Nine Cents ($5,212.59).

II.

That the defendant's application for attorneys fees upon the finding of the Tenth Circuit Court of Appeals that the Promissory Note sued upon by the plaintiff was usurious, be and the same is hereby sustained and the defendant's attorneys of record, Doerner, Stuart, Saunders, Daniel & Anderson, be awarded attorneys fees in the sum of Two Thousand Five Hundred Dollars ($2,500.00).

III.

The Court further finds that the defendant, W. M. (Pat) Boyles, has purged himself of willful, indirect contempt of this Court's order.

IV.

The Court further finds that with respect to the plaintiff's application for transfer of property in partial satisfaction of its judgment, that the matter is presently pending before the Honorable Judge Mahon of the United States District Court for the Northern District of Texas, sitting in Ft. Worth, Texas, and that this Court shall withhold ruling upon the plaintiff's application until the ruling of Judge Mahon regarding whether the property claimed in the plaintiff's application is homestead property of the defendant, W. M. (Pat) Boyles.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the plaintiff be, and is hereby awarded the sum of Four Thousand Three Hundred Thirty-Two Dollars ($4,332.00) as and for attorneys fees for the contemptuous conduct of the defendant, W. M. (Pat) Boyles, and the sum of Eight Hundred Eighty Dollars and Fifty-Nine Cents (880.59) as costs expended therein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the defendants attorneys of record, Doerner, Stuart, Saunders, Daniel & Anderson be, and the same are hereby awarded attorneys fees from the plaintiff in the sum of Two Thousand Five Hundred Dollars ($2,500.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff's application for transfer of property in partial satisfaction of its judgment, be and the same is hereby deferred for ruling until the decision of the Honorable Judge Mahon, United States District Court for the Northern District of Texas, sitting in Ft. Worth, Texas, on the question of homestead.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendant, W. M. (Pat) Boyles, has purged himself of willful, indirect contempt of this Court's orders.

CHIEF UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

JONES, GIVENS, BRETT, GOTCHER,
DOYLE & BOGAN, INC.

By: Rodney A. Edwards
Rodney A. Edwards,
Attorneys for Plaintiff

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: Michael Lewis
Michael Lewis,
Attorneys for Defendant,
W. M. (Pat) Boyles

CERTIFICATE OF MAILING

I hereby certify that on this 26 day of October, 1979, I mailed a true and correct copy of the above and foregoing Order to: Michael Lewis, 1200 Atlas Life Building, Tulsa, Oklahoma 74103; Nathan Hecht, 3600 Republic National Bank Tower, Dallas, Texas 74201; Frank D. McCown, 1702 Commerce Building, Ft. Worth, Texas 76102; and R. David Broiles, Suite 203, Fort Worth Club Building, Ft. Worth, Texas, with proper postage thereon fully prepaid.

Rodney A. Edwards
Rodney A. Edwards

JUDGMENT ON JURY VERDICT

CIV 31 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

RICHARD H. VAUGHN and AMERICAN MOTORIST INSURANCE COMPANY,

Plaintiffs,

vs.

INGERSOLL-RAND COMPANY,

Defendant.

CIVIL ACTION FILE NO. 78-C-137-C

JUDGMENT

This action came on for trial before the Court and a jury, Honorable H. DALE COOK, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that judgment is entered for the Defendant, Ingersoll-Rand Company, and against the Plaintiffs, Richard H. Vaughn and American Motorist Insurance Company, and that the Defendant recover of the Plaintiffs its cost of action.

FILED

OCT 26 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 26th day of October, 1979.

Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VICTOR W. RABON,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC. a Delaware corporation,

Defendant.

FILED

OCT 26 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 76-C-175

JUDGMENT

On the 22nd day of October, 1979 the above entitled cause came on for trial by jury before the Hon. Clarence Brimmer, United States District Judge. The plaintiff appeared in person and by his attorney Mr. C. Rabon Martin. The defendant appeared by its employee Captain E. L. Colling and its attorney Mr. Bert Jones. The parties announced ready and a jury of six was regularly impanelled. The plaintiff presented his evidence and rested, whereupon the defendant moved for dismissal upon the grounds that the evidence was insuffient to establish a claim upon which relief could be granted. The motion was taken under advisement by the Court pending conclusion of the case. The defendant presented its evidence and rested. The plaintiff presented his rebuttal evidence and again rested. Closing arguments of counsel were presented and the jury was instructed on the applicable law by the Court. The parties presented their objections to the instructions of the Court and their exceptions were duly noted. At the conclusion of deliberations, the jury returned with a unanimous verdict determining that the defendant had been negligent and that such negligence was a proximate cause of the plaintiff's injuries; that the plaintiff had also been negligent and that such negligence was also a proximate cause of the plaintiff's injuries; that, taking all negligence as 100%, the defendant's negligence constituted 51% and the plaintiff's constituted 49%; and, that the plaintiff's total damages were $50,000. The jury was polled by the Clerk and all jurors announced that the foregoing was their verdict.

Applying the percentages of negligence determined by the jury to the total damages determined by the jury, the Court reduced the plaintiff's recovery to $25,500. Pre-judgment interest from the filing of the complaint to the date of judgment of $8,948.28 was added in conformity with 12 O.S. Sec. 727, yielding a total recovery for the plaintiff of $34,448.28.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant in the sum of $34,448.28, together with interest thereon at the rate of 12% per annum from October 24, 1979 until paid, and taxable costs expended herein.

Dated October 26, 1979.

Clarence C. Brimmer

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TOM JOHNS, SUNEX RESOURCES INC., & UNIVERSITY INVESTMENT MANAGEMENT CO. Plaintiff, vs. H. OLIVER DANIEL & CHARLES R. UNSWORTH Defendant.	)	Civil Action No. 79-C-214-C

FILED

OCT 26 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This Action came on for hearing before the Court, Honorable H. Dale Cook, United States District Judge, presideing, for disposition for Plaintiffs failure to prosecute, and the Court having ~~heard testimony~~ been advised that Plaintiff does not object to the action being dismissed.

IT IS THEREFORE ORDERED and ADJUDGED that the above-styled cause be, and hereby is, dismissed for Plaintiffs failure to prosecute.

DATED This 26 day of October, 1979.

H. Dale Cook

H. DALE COOK, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 26 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

PREFERRED RISK MUTUAL INSURANCE COMPANY, a foreign corporation,

Plaintiff,

-vs-

No. 79-C-131-C

EVERETT L. THORNTON, ANNA MAY BONEY, MARQUITA JUNE CRAIG, a minor, JAMES ISAAC CRAIG, a minor, ANNETTE CRAIG, a minor, and ERNEST CRAIG,

Defendants.

JUDGMENT

On this 26th day of October, 1979, upon Stipulation of the parties presented and filed, the Court finds that the allegations of the Plaintiff's Complaint are true and correct and Plaintiff is entitled to the declaratory relief prayed for.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the insurance policies number F2617-166 and H201-508 written by Plaintiff to Everett L. Thornton insured are both and each of them inapplicable to that liability claim asserted by Defendants Boney and Craig from the incident of November 19, 1977 as heretofore asserted in civil action C-78-267 of the District Court, Mayes County.

IT IS FURTHER ORDERED AND DECREED that Plaintiff is therefore not obligated to provide any defense under said policies or make any payments with regard to the said claim or claims as heretofore or hereafter asserted.

H. Dale Cook
JUDGE

APPROVED AS TO FORM:

James E. Poe
JAMES E. POE
Attorney for Plaintiff

PAUL B. NAYLOR
Attorney for Defendant Thornton

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARIE C. WEBBER,

Plaintiff,

vs.

TRUCK INSURANCE EXCHANGE, TRUCK UNDERWRITERS ASSOCIATION, a foreign insurance company, and J. M. HUNTER,

Defendants.

No. 79-C-453-D

FILED
OCT 26 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has before it for consideration Plaintiff's Motion to Remand, as well as the application of Hillcrest Medical Center, Inc., seeking an order allowing it to intervene in this action. Defendants have responded to Plaintiff's motion, and both Defendants and Plaintiff have responded to Hillcrest's application.

The Court first directs its attention to Plaintiff's Motion to Remand.

Plaintiff commenced this action in the District Court of Creek County, Oklahoma, alleging that Defendant Hunter, acting as agent for Defendant Truck Insurance Exchange, accepted payment for a policy of insurance to be issued covering vehicles owned by Plaintiff's husband; this policy, Plaintiff alleges, was to provide uninsured motorist coverage with a limit of $25,000.00 and medical pay coverage in the amount of $2,000.00. Plaintiff alleges that Defendants Hunter and Truck Insurance Exchange negligently failed to issue and deliver this policy to Plaintiff's husband.

Approximately one month after payment for the policy was allegedly accepted by Defendant Hunter, Plaintiff was injured in an automobile accident, as a result of which, Plaintiff alleges, medical and hospital expenses of more

than $40,000.00 were incurred. Plaintiff instituted suit against the negligent motorist, and obtained judgment against him, which judgment is now final.

Plaintiff alleges that she is entitled to judgment against Defendants for $2,000.00 medical pay coverage as well as $25,000.00 uninsured motorist coverage because the liability insurance carried by the negligent motorist was less than the uninsured motorist coverage under the policy that should have been issued.

Defendants' Petition for Removal alleged that this controversy was wholly between citizens of different states, in that Defendant Hunter, a citizen of Oklahoma, was fraudulently joined as a party defendant solely for the purpose of attempting to preclude removal of the case from state court. Defendants argue that Hunter is an unnecessary party and that the "real issues" are between Plaintiff and the non-resident Defendants.

Defendants, in their Answer, state that the policy in question was not issued at the time of the accident, but admit that the coverage was in effect at that time even though the policy had not been issued. However, Defendants deny that the policy provided for uninsured motorist coverage or medical pay. Defendants argue that inasmuch as Plaintiff alleges no damages resulting from her failure to receive the policy, and she seeks only to recover for injuries and losses allegedly covered by the policy, her lawsuit is based upon the insurance contract, and not negligence. Plaintiff's complaint does not, it is argued, state a cause of action against Defendant Hunter, and therefore, Defendants contend, his joinder is fraudulent and may be disregarded for purposes of removal.

Plaintiff argues that while Hunter is not a necessary party to this action, an insurance agent may be held personally liable for failure to procure the insurance sought.

Therefore, Plaintiff contends, if uninsured motorist coverage and medical pay coverage was sought by Plaintiff's husband, and the coverage which Defendants concede exists did not include these elements, Defendant Hunter may be liable to Plaintiff for his failure to procure the coverage desired.

As Plaintiff's motion to remand is presently before the Court, the burden of proof is on the Defendants, as the removing parties, to show that this action was properly removed. P. P. Farmers' Elevator Co. v. Farmers Elevator Mutual Insurance Co., 395 F.2d 546 (Seventh Cir. 1968); Williams v. Tri-County Community Center, 323 F.Supp. 286 (S.D.Miss. 1971), aff'd, 452 F.2d 221 (Fifth Cir. 1971); Heymann v. Louisiana, 269 F.Supp. 36 (E.D.La. 1967). Where there is any substantial doubt concerning jurisdiction of the federal court on removal, the case should be remanded and jurisdiction should be retained only where it is clear. See Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941); Morrison v. Jack Richards Aircraft Co., 328 F.Supp. 580 (W.D.Okla. 1971); Williams v. Tri-County Community Center, supra; see Jerro v. Home Lines, Inc., 377 F.Supp. 670 (S.D. N.Y. 1974). The provisions of the statutes authorizing removal, in that they represent congressionally-authorized encroachments into state sovereignty, are to be strictly construed. Town of Freedom v. Muskogee Bridge Co., 466 F.Supp. 75 (W.D.Okla. 1978); Lee v. Volkswagen of America, Inc., 429 F.Supp. 5 (W.D.Okla. 1976).

When fraudulent joinder is alleged, however, the defendants' task is even more exacting. Fraudulent joinder must be alleged with particularity and proven with such complete certainty as to make the issue capable of summary determination. Smoot v. Chicago, Rock Island & Pac. R.R. Co., 378 F.2d 879 (Tenth Cir. 1967); Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (Tenth Cir. 1964); McLeod v.

Cities Service Gas Co., 233 F.2d 242 (Tenth Cir. 1956); Updike v. West, 172 F.2d 663 (Tenth Cir.), cert. denied, 337 U.S. 908 (1949); Town of Freedom v. Muskogee Bridge Co., supra; Shultz v. Commercial Standard Insurance Co., 297 F.Supp. 1154 (W.D.Okla. 1969); Winton v. Moore, 288 F.Supp. 470 (N.D.Okla. 1968); see also 1A Moore's Federal Practice ¶0.161[2]. Failure to meet this burden requires that the case be remanded to state court, e.g., Sparks v. St. Louis & San Francisco R.R. Corp., 366 F.Supp. 957 (W.D.Okla. 1973); Thomas v. Archer, 330 F.Supp. 1181 (W.D.Okla. 1971); Fine v. Braniff Airways, Inc., 302 F.Supp. 496 (W.D.Okla. 1969); Winton v. Moore, supra.

For a joinder to be considered fraudulent, it must be shown, with clear certainty as discussed supra, that there cannot be any reasonable ground of liability. Town of Freedom v. Muskogee Bridge Co., supra; Gillette v. Koss Constr. Co., 149 F.Supp. 353 (W.D.Mo. 1957). The possibility that a right to relief exists is sufficient to avoid the conclusion that joinder is fraudulent. Town of Freedom v. Muskogee Bridge Co., supra; see also Sparks v. St. Louis & San Francisco R.R. Corp., supra; Fine v. Braniff Airways, Inc., supra; 1A Moore's Federal Practice ¶0.161[2] at 212-213; 14 Wright & Miller §3723 at 617-618; Note, Fraudulent Joinder to Prevent Removal, 27 Okla. L.Rev. 264 (1974).

This Court has stated on several occasions that in a removal based on alleged fraudulent joinder, the circumstances must be such as to enable the Court to determine that a motion to dismiss the fraudulently joined defendant from the case would be proper. See Town of Freedom v. Muskogee Bridge Co., supra; Sparks v. St. Louis & San Francisco R.R. Corp., supra; Thomas v. Archer, supra; Fine v. Braniff Airways, Inc., supra; Winton v. Moore, supra. In order to find that Defendant Hunter has been fraudulently joined, therefore, the Court must be able to say that the

complaint (petition) fails to state a claim against him upon which relief could be granted.

It is the rule, of course, that dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts in support of the claim which would entitle him to relief. Cruz v. Beto, 405 U.S. 319 (1972); Jenkins v. McKeithen, 395 U.S. 411 (1969); Conley v. Gibson, 355 U.S. 41 (1957); Bell v. Hood, 327 U.S. 678 (1946); Bryan V. Stillwater Bd. of Realtors, 578 F.2d 1319 (Tenth Cir. 1977); American Home Assur. Co. v. Cessna Aircraft Co., 551 F.2d 804 (Tenth Cir. 1977); Dewell v. Lawson, 489 F.2d 877 (Tenth Cir. 1974); Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1103 (Tenth Cir. 1973); Jackson v. Alexander, 465 F.2d 1389 (Tenth Cir. 1972); Franklin v. Meredith, 386 F.2d 958 (Tenth Cir. 1967); Coyle v. Hughs, 436 F.Supp. 591 (W.D.Okla. 1977); Hartford Acc. & Indem. Co. V. Merrill Lynch, Pierce, Fenner & Smith, Inc., 74 F.R.D. 357 (W.D. Okla. 1976); Hatridge v. Seaboard Surety, 74 F.R.D. 6 (E.D. Okla. 1976); Starke v. Secretary, U. S. Dept. of Housing and Urban Development, 454 F.Supp. 477 (W.D.Okla. 1976); Town of Freedom v. Muskogee Bridge Co., supra.

In Shultz v. Commercial Standard Insurance Co., supra, the plaintiff initiated an action in state court against his insurance company, a foreign corporation, and its resident agent. The case was removed to the United States District Court for the Western District of Oklahoma by the insurer. The Court noted that plaintiff's claim was stated as though both defendants were insurers, alleging that defendants had a duty to defend plaintiff against certain actions and a duty to pay any losses arising therefrom. Plaintiff in the Schultz case alleged merely that the individual defendant was an agent of the insurer and acted as such in the issuance of the policy. The Court, after reviewing the applicable Oklahoma authorities, concluded that under Oklahoma

law, an agent is not personally bound on contracts made for a disclosed principal, and that the plaintiff had failed to state a claim against the agent, inasmuch as it would have been subject to dismissal at the time it was removed to federal court. The motion to remand was accordingly denied. 297 F.Supp. at 1156.

Unlike the plaintiff in Shultz, supra, Plaintiff herein goes further and alleges that coverage was not procured due to the negligence of Defendant Hunter. The general rule is that an agent or broker who fails to procure the insurance requested, or who procures inadequate insurance, is liable to the person desiring insurance. See generally, 16 Appelman, Insurance Law and Practice §§8831, 8841, 8843 (1968 and 1979 Supp.) Annot., 72 A.L.R.3d 704 (1976); Annot., 64 A.L.R.3d 398 (1975); Annot., 29 A.L.R.2d 171 (1953). This is the rule in Oklahoma as well. "An insurance agent or broker who undertakes to procure and maintain insurance for another is under [a] duty to exercise reasonable diligence and skill in obtaining and maintaining such insurance." DeWees v. Cedarbaum, 381 P.2d 830, Syllabus at 831 (Okla. 1963). See also Wright v. Hartford Accident & Indemnity Co., 258 F.Supp. 841 (W.D.Okla. 1966); Mid-America Corp. v. Roach, 412 P.2d 188 (Okla. 1966).

The fact that Defendants concede that coverage was in effect, does not, in and of itself, affect Plaintiff's allegations of negligence. Defendants do not concede that uninsured motorist or medical pay provisions were included in this coverage, and Plaintiff specifically alleges that this coverage was to be provided by the insurance which Hunter was to procure. Why such coverage was not provided, if, as Defendants concede, insurance coverage was in effect at the time of the accident, is a question yet to be determined. It is impossible to say, at this time, and with the certainty required in determining whether joinder is fraudulent

or not, that there is no possible basis upon which Defendant Hunter may be liable to Plaintiff.

Accordingly, this Court cannot conclude that Defendant Hunter is fraudulently joined, and this case must be remanded as there is a lack of complete diversity of citizenship between the parties herein. The Court finds that removal of this action was improvident, and that this case should be remanded to the state court from which it was removed. 28 U.S.C. §1447(c).

As this Court lacks jurisdiction regarding this case, and has no authority other than to remand the case, the Application for Order Allowing Intervention of Hillcrest Medical Center, Inc. is referred to the state court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand be and hereby is sustained, and the Court remands this case to the State District Court of Creek County, Oklahoma.

The Clerk of the Court is hereby directed to take the necessary action to remand this case without delay.

It is so Ordered this 16th day of October, 1979.

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES OTIS FOWLKES, a/k/a, JIMMY O. FOWLKES and CYNTHIA F. FOWLKES, husband and wife; BOARD OF COUNTY COMMISSIONERS Tulsa County, Oklahoma; and COUNTY TREASURER, Tulsa County, Oklahoma, Defendants.	)	CIVIL NO. 79-C-350-D

FILED

OCT 25 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24 day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, appearing by its attorney, Deryl L. Gotcher, Jr., Assistant District Attorney; and the Defendants, James Otis Fowlkes, a/k/a Jimmy O. Fowlkes and Cynthia F. Fowlkes, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, James Otis Fowlkes, a/k/a Jimmy O. Fowlkes and Cynthia F. Fowlkes, were served by publication as shown on Proof of Publication filed herein; that Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, were served with Summons, Complaint and Amendment to Complaint on May 16, 1979, as appears from the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma have duly filed its answers herein on June 5, 1979; and that the Defendants, James Otis Fowlkes, a/k/a Jimmy O. Fowlkes and Cynthia F. Fowlkes, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifty-five (55), Block Two (2), in SURBURBAN ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, James Otis Fowlkes and Cynthia F. Fowlkes, did, on the 17th day of December, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,400.00 with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, James Otis Fowlkes and Cynthia F. Fowlkes, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,472.46 as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from August 1, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Jimmy O. Fowlkes ~~and Lardeeba Fowlkes~~, the sum of $ 12.58 plus interest according to law for personal property taxes for the year(s) 1971 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, James Otis Fowlkes and Cynthia F. Fowlkes, in rem, for the sum of $9,472.46 with interest thereon at the rate of 8 1/2

percent per annum from August 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Jimmy O. Fowlkes ~~and Gardella Fowlkes~~ for the sum of $ 12.58 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

BY: ROBERT P. SANTEE
Assistant United States Attorney

DERYL L. GOTCHER, JR.
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DON H. WELCH,

Plaintiff,

-vs-

ROY B. AND JANE MORAN,

Defendants.

No. 76-C-372-Brimmer

FILED

OCT 25 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

On this 25th day of September, 1979, after non-jury trial, before the Honorable Clarence A. Brimmer, Judgment is entered in favor of the plaintiff and against the defendants in the sum of $20,484.87, together with the costs of the action.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and obtain judgment against the defendants, and each of them, in the sum of $20,484.87, together with the costs of this action, all of which shall bear interest at the rate of 12% per annum until paid.

Dated this 25th day of October, 1979.

Clarence A. Brimmer
Judge

APPROVED:

Jay C. Baker, Attorney for Plaintiff

DOERNER, STUART, SAUNDERS, DANIEL & ANDERSON

BY: Gary McDonald, Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 25 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
CLARENCE RAY BUTTERFIELD, a/k/a, C. R. BUTTERFIELD, a/k/a, CLARENCE BUTTERFIELD, Defendant.	)	Civil No. 79-C-204-D

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 25th day of October, 1978.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 24 1979

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
JACKIE R. DIXON, Defendant.	)	CIVIL ACTION NO. 79-C-601 -C

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Jackie R. Dixon, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Jackie R. Dixon, was personally served with Summons and Complaint on September 25, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Jackie R. Dixon, for the sum of $2,156.91, plus interest at the legal rate from the date of this Judgment.

/S/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

JUDGMENT ON JURY VERDICT (CIV 31 (7-63))

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 78-C-135-C

MARGARET ANN HARDEN,

Plaintiff,

vs.

JUDGMENT

DOMAIN INDUSTRIES, INC.,

Defendant.

This action came on for trial before the Court and a jury, Honorable H. DALE COOK, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is entered for the Defendant, Domain Industries, Inc., and against the Plaintiff, Margaret Ann Harden, and that the Defendant recover of the Plaintiff its cost of action.

FILED

OCT 24 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 24th day of October, 19 79.

Clerk of Court

42.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 24 1979
U. S. District Court

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
ROBERT D. EASTLAND, Defendant.	)	CIVIL ACTION NO. 79-C-599-C

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Robert D. Eastland, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Robert D. Eastland, was personally served with Summons and Complaint on September 25, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Robert D. Eastland, for the sum of $1,469.45, as of July 17, 1979, plus interest from and after said date at the rate of 7% per annum.

/s/ H Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 24 1979

U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
GLENN R. LANE, Defendant.	)	CIVIL ACTION NO. 79-C-583-C

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Glenn R. Lane, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Glenn R. Lane, was personally served with Summons and Complaint on September 15, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Glenn R. Lane, for the sum of $562.47, as of July 18, 1979, plus interest from and after said date at the rate of 7% per annum.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 24 1979

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
NANCY E. SEAMAN, Defendant.	)	CIVIL ACTION NO. 79-C-582-C

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Nancy E. Seaman, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Nancy E. Seaman, was personally served with Summons and Complaint on September 15, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Nancy E. Seaman, for the sum of $2,573.87, as of August 25, 1979, plus interest from and after said date at the rate of 7% per annum.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

B & B TRADING COMPANY, an Oklahoma Corporation, and HENRY L. BURTON, President of B & B Trading Company, Plaintiffs	)	
vs.	)	No. 79-C-528-C
DEPARTMENT OF ENERGY, an Executive Department of the United States of America; JAMES R. SCHLESINGER, Secretary of Energy; and CHARLES DUNCAN, Secretary of Energy Designee, Defendants	)	

NOTICE OF DISMISSAL

TO: DEPARTMENT OF ENERGY, an Executive Department of the United States of America; JAMES R. SCHLESINGER, Secretary of Energy; CHARLES DUNCAN, Secretary of Energy Designee and ELLEN SAZZMAN, Defendants' Attorney.

NOTICE is hereby given that inasmuch as the Department of Energy Subpoena, issued on July 13, 1979, was withdrawn by the Defendants on October 18, 1979, the above-entitled action is hereby dismissed without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

DATED THIS 23rd day of October, 1979.

PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR

By: _____
J. WARREN JACKMAN
2200 Fourth National Bldg.
Tulsa, Oklahoma 74119

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOETTA JEFFRIES and K. C. JEFFRIES, Plaintiffs,	)	
vs.	)	No. 78-C-407-C
HARRY T. HUDSON and LOUISE F. HUDSON, Defendants.	)	

NOTICE OF
DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiffs and dismiss the above captioned cause with prejudice and release and forever discharge the Defendants from any and all claims or causes of action which they may now or hereinafter have against them by reason of any acts or occurrences prior to the date of this judgment.

K. C. Jeffries
K. C. Jeffries

Joetta Jeffries
Joetta Jeffries

SUBSCRIBED AND SWORN to before me this 15th day of October, 1979.

Notary Public

My commission expires:

October 26, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

GEORGE E. KING, Plaintiff,	)	
vs.	)	No. 78-C-194-C
3-R CORPORATION, Defendant.	)	

FILED
OCT 19 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL OF PLAINTIFF'S COMPLAINT

On this 19th day of October, 1979, upon the written stipulation of the parties for a dismissal with prejudice of the plaintiff's complaint, the Court having examined said stipulation finds the parties have entered into a compromise settlement of all of the claims involved herein, and the Court being fully advised in the premises finds that plaintiff's complaint against the defendant should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the complaint of the plaintiff against the defendant be and the same is hereby dismissed with prejudice to any future action.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MEDA J. LIVELY, Plaintiff, vs. WALTER GRAY and PATRICIA L. GRAY, both individually and d/b/a WALTER GRAY AGENCY, INC., Defendants.	)	No. 78-C-89-C

FILED
OCT 19 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW on this 5th day of September, 1979, this cause came on for non-jury trial before the Court, the Honorable Aldon J. Anderson presiding. The Plaintiff, Meda J. Lively, was present and represented by Mr. Gene Stipe and Mr. Monte Brown. The Defendants, Walter Gray and Patricia L. Gray, were both present and represented by their attorney, Lloyd E. Cole. The Defendant, Walter Gray Agency, Inc., was represented by its attorney, Ronald D. Wood.

Jury trial, having been waived in open Court by all parties on September 4, 1979, this cause proceeded to trial with all parties having announced ready. The Court determined that it had jurisdiction over the parties and the subject matter of this action and thereafter, the witnesses were sworn and testimony was taken. When the Plaintiff announced that she had completed the presentation of her evidence and rested her case, the Defendant, Walter Gray Agency, Inc., moved for a dismissal of all causes of action against it on the ground that upon the facts and the law, the Plaintiff had shown no right to relief, all as provided in Rule 41 (b) of the Federal Rules Of Civil Procedure. After hearing argument of counsel on the Motion To Dismiss and over the objection of Plaintiff, the Court ordered a dismissal of any and all causes of action which the Plaintiff maintained against the Defendant, Walter Gray Agency, Inc.

The Court specifically found that the Plaintiff's evidence had not presented any facts which would show or lead to the inference that the Defendant, Walter Gray Agency, Inc., was a party to the

contract or transaction between the Plaintiff, Meda J. Lively, and the Defendants, Walter Gray and Patricia L. Gray, as individuals. The Court found that the Defendant, Walter Gray Agency, Inc., was not a party to the contract or either of the two supplemental agreements between Meda J. Lively and Walter Gray and Patricia L. Gray. The Court found that the Walter Gray Agency, Inc., had received no payment of money or consideration of any kind from the transaction between Meda J. Lively and Walter Gray and Patricia L. Gray. The Court further found that the Defendant, Walter Gray Agency, Inc., had no ownership or security interest in the property, either real or personal, which was the subject of the transaction between Meda J. Lively and Walter Gray and Patricia L. Gray.

The Court ruled, as a matter of law, that since no facts had been adduced by Plaintiff's evidence to in any way link the Walter Gray Agency, Inc., to the transaction between Meda J. Lively and Walter Gray and Patricia L. Gray, therefore, the Defendant, Walter Gray Agency, Inc., should be dismissed from this lawsuit.

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that Judgment is rendered for the Defendant, Walter Gray Agency, Inc., and that costs be recovered from the Plaintiff.

Aldon J. Anderson

ALDON J. ANDERSON, JUDGE

APPROVED AS TO FORM:

STIPE, GOSSETT, STIPE & HARPER

By_____
Monte Brown,
Attorney for Plaintiff

GRIGG, RICHARDS & PAUL

By Ronald D. Wood
Ronald D. Wood
Attorney for Defendant,
Walter Gray Agency, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARRELL W. SMALLWOOD,)
)
Plaintiff,)
)
-vs-)
)
AMOS WARD, Sheriff of Rogers)
County, Oklahoma; and)
WALTER M. MARKHAM, Deputy)
Sheriff, Rogers County, Oklahoma,)
)
Defendants.)

FILED
OCT 19 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

Case Number
77-C-101-C

ORDER

It appearing to the Court that the above-named Plaintiff and Defendant have entered into a stipulation for voluntary dismissal of cause which was duly filed in this action on Oct 19, 1979; therefore,

IT IS ORDERED AND ADJUDGED that the above entitled action be, and it is hereby dismissed, without cost to either party and without prejudice to the Plaintiff.

Dated Oct 19, 1979.

/s/ Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES A. LEE,

Plaintiff,

vs.

FRUEHAUF CORPORATION,

Defendant.

No. 78-C-535-BC

FILED
OCT 18 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, James A. Lee, and dismisses this cause with prejudice to the rights to the bringing of any other future action.

James A. Lee
Plaintiff

Donald L. Booth
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BPM, LTD., Petitioner	)	
V.	)	Civil Action No. 79-C-154-C
THE DEPARTMENT OF ENERGY and JOHN H. MELVIN, Special Investigator, and officer of The Department of Energy, Respondents	)	

FILED

OCT 17 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On the 17th day of October, 1979, the Court considered Respondent's Motion to Dismiss Counter Claim and Motion for Summary Judgement. The Court finds as follows:

MOTION TO DISMISS COUNTER CLAIM

1. That a responsive pleading has not been filed to Respondents' Counter Claim.

2. That therefore paragraph (1) of subdivision (a) and subdivision (c) of Rule 41 of the Federal Rules of Civil Procedure (28 USC Rule 41) apply and Respondents' Motion to Dismiss Counter Claim should be granted without prejudice.

MOTION FOR SUMMARY JUDGEMENT

1. That the subpoena upon which Petitioner's claim is founded has been withdrawn by the Department of Energy and John H. Melvin, Respondents.

2. That there is no genuine issue as to any material fact.

3. That Respondents are entitled to a Judgement as a matter of law.

It is therefore Ordered, ajudged and decreed that Respondents' Counter Claim in the above styled and numbered cause be, and the same is, hereby dismissed without prejudice.

It is further, Ordered, ajudged and decreed that Petitioner take nothing and that Petitioner's action be dismissed on the merits.

It is so ordered this 17th day of October, 1979.

Judge, United States
District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT B. SUTTON, Petitioner)

V.) Civil Action No. 79-C-153-C

THE DEPARTMENT OF ENERGY and)
JOHN H. MELVIN, Special)
Investigator, and officer of)
The Department of Energy,)
Respondents)

FILED

OCT 17 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On the 17th day of october, 1979, the Court considered Respondents' Motion to Dismiss Counter Claim and Motion for Summary Judgement. The Court finds as follows:

MOTION TO DISMISS COUNTER CLAIM

1. That a responsive pleading has not been filed to Respondents' Counter Claim.

2. That therefore paragraph (1) of subdivision (a) and subdivision (c) of Rule 41 of the Federal Rules of Civil Procedure (28 USC Rule 41) apply and Respondents' Motion to Dismiss Counter Claim should be granted without prejudice.

MOTION FOR SUMMARY JUDGEMENT

1. That the subpoena upon which Petitioner's claim is founded has been withdrawn by the Department of Energy and John H. Melvin, Respondents.

2. That there is no genuine issue as to any material fact.

3. That Respondents are entitled to a Judgement as a matter of law.

It is therefore Ordered, ajudged and decreed that Respondents' Counter Claim in the above styled and numbered cause be, and the same is, hereby dismissed without prejudice.

It is further, Ordered, ajudged and decreed that Petitioner take nothing and that Petitioner's action be dismissed on the merits.

It is so ordered this 17th day of october, 1979.

Judge, United States
District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROLF PFAHL,)
)
Plaintiff,)
)
v.) No. 78-C-615-C
)
SECRETARY OF HEALTH,)
EDUCATION AND WELFARE,)
)
Defendant.)

FILED
OCT 16 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education, and Welfare denying him disability benefits provided for in Sections 216 and 223 of the Social Security Act, as amended, 42 U.S.C. §§ 416, 423. He asks that the Court reverse the decision and award him the additional benefits he seeks.

The matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued on June 7, 1978. The Administrative Law Judge found that Plaintiff was not entitled to disability benefits under Section 216 and 223 of the Social Security Act, as amended. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on October 18, 1978, issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which

would benefit the Plaintiff. Thus, the decision of the Administrative Law Judge became the final decision of the Secretary.

Plaintiff contends that the Secretary's denial of his claim is incorrect and that the record supports his claim of disability. The Secretary's denial was based on his finding that Plaintiff's orthopedic problems were not severe enough to be considered disabling or to preclude substantial gainful activity. Plaintiff principally contends that the Administrative Law Judge failed to make specific findings regarding the credibility of Plaintiff's subjective complaints of pain.

In his "Application for Disability Insurance Benefits" Plaintiff states that his disability consists of "Hip prosthesis in R. hip due to bone deterioration, arthritis in R. hip and back," and that he became unable to work due to his disability on August 2, 1977. (Tr. 69).

The medical evidence upon which the Secretary's decision was based included, in addition to other evidence, the report of James F. Snipes, M. D., a specialist in Internal Medicine who had treated the Plaintiff for kidney problems. (Tr. 114, 117, 124). Dr. Snipes stated that Plaintiff had a "significant amount of pain." He recommended restricted standing in Plaintiff's job activity on January 19, 1977 and permanent disability status for Plaintiff on April 20, 1978. (Tr. 114, 124).

On January 30, 1978, a consultative examination was conducted by John C. Dauge, M. D., an Orthopedic Surgeon. Tr. 115-116, 118). In his medical report, Dr. Dauge also noted Plaintiff's complaints of pain. (Tr. 115). Dr. Dauge concluded after examination that Plaintiff was capable of a "limited sedentary level of activity." (Tr. 116).

Other evidence considered by the Administrative Law Judge included a medical report of Alfred Bungardt, M. D., an Orthopedic Surgeon. (Tr. 119). Dr. Bungardt, who had been treating the patient since 1973 stated:

> "Throughout the time of my treatment of the patient, I have repeatedly stated that I feel that he cannot perform in an occupation which requires him to walk or stand for an 8 hour period, five days a week. I feel that he is perfectly capable of performing in any type of gainful occupation which would not require this length of standing or walking and that he should be able to carry on without difficulty in an occupation which would require 50% of this amount of activity as far as his hip is concerned." (Tr. 100)

In his summary and evaluation of the evidence the Administrative Law Judge noted Plaintiff's complaints of pain and the Findings specifically stated that "[c]laimant has varying degrees of pain and discomfort. . . ." Tr. 8, 12). The Administrative Law Judge noted that Plaintiff continues to pursue some normal activities and that Plaintiff returned to his former job with the understanding that suitable adjustments in his job activities would be made. (Tr. 40, 114). Plaintiff quit work on August 2, 1977 only when he realized his duties were not going to be reduced. (Tr. 8, 11, 39-40).

The record indicates that Plaintiff was only 42 years old when he allegedly became disabled. He has a twelfth grade education and worked many years as a baker. The vocational expert, Minor W. Gordon, Ph. D., testified that he had reviewed all the documents in the record; that he had heard the plaintiff's testimony before the Administrative Law Judge; that he had evaluated Plaintiff's prior work experience; that although Plaintiff would not be able to return to his former work, he demonstrated significant vocational skills and Plaintiff would be able to perform

certain sedentary, clerical work such as a self-service station attendant or a motel clerk. Dr. Gordon testified that such jobs exist in significant numbers in the local as well as the national economy. (Tr. 57-65).

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberrry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351, F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not

reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D. S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents him engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969). In addition, a claimant has the burden of proving that his disability continued past the time of cessation found by the Secretary. Alvarado v. Weinberger, 511 F.2d 1046 (1st Cir. 1975); Myers v. Richardson, 471 F.2d 1265 (6th Cir. 1972); McCarty v. Richardson, 459 F.2d 3 (5th Cir. 1972).

The medical reports indicate Plaintiff does have a problem with his right hip, but this impairment has not been

shown to be of disabling severity. This impairment could not be said to prevent Plaintiff's doing the light or sendentary work described by the vocational expert. Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971); Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

The Secretary's decision indicates that he gave careful consideration to Plaintiff's subjective complaints of pain, and resolved the issue against Plaintiff. Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965). He also considered the opinions of Plaintiff's internist that he was disabled, and accorded greater weight to the medical opinions which were supported by clinical and laboratory test results. Janka v. Secretary of Health, Education, and Welfare, 589 F.2d 365 (8th Cir. 1978).

The Secretary's regulations vest discretion in the Administrative Law Judge to weigh physicians' conclusory opinions. 20 C.F.R. § 404.1526; Trujillo v. Richardson, 429 F.2d 1149(10th Cir. 1970). As trier of facts, it is the Secretary's responsibility to consider all the evidence, to resolve any conflicts in the evidence, and to decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F.Supp. 853 (D. Kan. 1968), aff'd, 416 F.2d 1257 (10th Cir. 1969).

Although Plaintiff has alternatively prayed for remand of this case, it is clear that the good cause requirements for remand under 42 U.S.C. § 405(g) demand more than a desire to relitigate the same issues. Bradley v. Califano, 573 F.2d 28 (10th Cir. 1978).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not entitled to disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 16th day of October, 1979.

H. DALE COOK

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PHERREL E. PALMOUR, Plaintiff, v. PATRICIA ROBERTS HARRIS, Secretary of Health, Education, and Welfare, Defendant.	)	No. 78-C-538-C

FILED
OCT 16 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education and Welfare denying him continued disability benefits and supplemental security income benefits provided for in Sections 216 and 1614(a) of the Social Security Act, as Amended. 42 U.S.C. §§ 416, 423, and 1382(c). He asks that the Court reverse the decision and award him the additional benefits he seeks.

This matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued August 1, 1978. The Administrative Law Judge found that Plaintiff was not entitled to continued disability benefits or supplemental security income benefits under the Social Security Act, as amended after October, 1977, because by that date he regained the residual functional capacity to perform the light and sendentary work discussed by the vocational expert. Thereafter, that decision was appealed

to the Appeals Council of the Bureau of Hearings and Appeals, which Council on August 31, 1978, issued its finding that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the Plaintiff. Thus, the decision of the Administrative Law Judge became the final decision of the Secretary from which Plaintiff has brought this action for judicial review.

Plaintiff maintains that he has proved that he has been continuously disabled since November 15, 1975, because of his nervousness and arthritis. In his December 18, 1975 "Application for Disability Insurance Benefits" Plaintiff states that his disability consists of "Arthritis." Plaintiff's claim was initially denied. On August 23, 1976, an Administrative Law Judge rendered a favorable decision based on Plaintiff's osteoarthritis and mild anxiety neurosis, with the recommendation that the case be reviewed periodically since the disability could be temporary. On November 14, 1977, the Bureau of Disability Insurance determined that Plaintiff's disability had ceased in October, 1977.

Plaintiff contends that the Secretary's decision that Plaintiff's disability ceased in October, 1977 and that Plaintiff was not thereafter entitled to disability insurance benefits was incorrect. The Secretary's decision was predicated on his finding that Plaintiff's functional physical capacity had improved enough to allow him to engage in substantial gainful activity. Plaintiff also argues that the Administrative Law Judge did not give proper consideration to all of the medical opinions or to Plaintiff's subjective complaints of pain. Plaintiff further claims that although he may be theoretically capable of substantial gainful activity, there is almost no possibility of actually obtaining employment.

The medical evidence considered by the Administrative Law Judge included, among other evidence, a letter of Paul A. Mobley, D. O., a General Practitioner. (Tr. 180, 183). In Dr. Mobley's letter, he states that he had treated the Plaintiff since 1971 for degenerative discus of the cervical spine, arthritis of the hands, tremor from service wounds, and chronic obstructive pulmonary disease and that as of April 28, 1978, the Plaintiff is "unable to be gainfully employed." (Tr. 180).

Additional evidence includes reports from Veterans Administration physicians in which Plaintiff was found to have a full range of motion in the cervical and lumbar spine and "no evidence of active inflammation in any of his joints." (Tr. 82). The report of Plaintiff's special psychiatric consultation concludes that Plaintiff's "Occupational capacity is impaired moderately." (Tr. 84). Further records of the Veterans Administration indicate that Plaintiff was hospitalized January 9-16, 1976 for "Left upper lobe infiltrate. Probable old healed tuberculosis." The record further indicates that there was "Tenderness on palpation to the cervical spine at the level of C6 and C7", but "No swelling or increased local heat of the fingers." (Tr. 98).

The Administrative Law Judge further considered the August 11, 1976 report of Averill Stowell, M. D. (Tr. 105-108). After consultative examination, Dr. Stowell states that Plaintiff is "temporarily totally disabled in the performance of ordinary manual labor." (Tr. 106).

On September 26, 1977, the Plaintiff was examined by Robert T. Rounsaville, M. D. (Tr. 157-158, 162). In Dr. Rounsaville's report, he states that Plaintiff was complaining of stiffness in his neck and hands and that he "shakes." (Tr. 157). As a result of the examination, Dr. Rounsaville

concludes that the Plaintiff's "difficulties appear to be functional and related to marked nervous difficulties. . . I do not think his thoracic complaints or neck difficulties are any more than functional. The patient is able to work." (Tr. 158).

Plaintiff was given a psychiatric examination by Gary M. Lee, M. D. on October 13, 1977. (Tr. 158-161). In Dr. Lee's report, Dr. Lee found that Plaintiff has "no restriction of daily activities or ability to relate to other people"; that Plaintiff is oriented well and has no memory deficiency nor any impairment of reasoning or judgment; that there was no evidencce of psychoneurosis, psychosis, disturbance in association of ideas, hallucination, delusions nor any objective findings of depression. Dr. Lee's diagnosis was reactive anxiety, secondary to physical problems. (Tr. 160).

Further medical evidence considered by the Administative Law Judge included the report of Randel A. Patty, M. D., a Radiologist. (Tr. 181, 184). After X-rays, Dr. Patty's impression was "[m]ild degenerative changes otherwise negative cervical spine with no interval changes since 4-5-76." (Tr. 181).

The vocational expert, V. Clinton Purtell, testified that he had reviewed all of the exhibits which were admitted into evidence; that he had heard the Plaintiff's testimony before the Administrative Law Judge; that he had evaluated Plaintiff's prior work experience; that Plaintiff could not return to his former semi-skilled labor ranging from light to very heavy work; that although Plaintiff might have difficulty obtaining work, he would be capable of performing in several types of positions. The vocational expert witness listed the following jobs: security guard for a private

security company; work in a self service gas station or a laundry; work in a tool rental business, home and building supply; clerical helper in a truck and tractor rental company; cleaning up homes for showing; parking lot attendant; light custodial work in hopsitals, schools and large office buildings; truck or heavy equipment service parts man; city or utility company meter reader; insurance estimator or truck and heavy equipment estimator of damages or accidents; flag man for highway construction; sedentary government job such as a mail carrier; a sitter with the sick or disabled; worker in a pool hall or dominoe hall. The Vocational Expert testified that such suitable jobs exist in this part of the state. (Tr. 39-45).

The Administrative Law Judge also took into consideration the Plaintiff's statements concerning his physical pain and further noted that Plaintiff's daily activities include "helping his wife around the house, watching television, and driving downtown to play dominoes." (Tr. 11).

After carefully considering all the evidence Plaintiff offered to support his claim, the Administrative Law Judge found that Plaintiff had failed to substantiate the existence of impairments severe enough to prevent his doing the light and sendentary work discussed by the vocational expert after October, 1977.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is

substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberrry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351, F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D. S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents him engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969). Most importantly, Plaintiff had the burden of proving that his disability continued past October, 1977, cessation date found by the Secretary. Myers v. Richardson, 471 F.2d 1265 (6th Cir. 1972).

The Secretary found that by October, 1977, Plaintiff had regained the capacity for light and sedentary work. The reports of Dr. Rounsaville and Dr. Lee provide substantial evidence to support that conclusion. The Secretary also considered the opinion of Plaintiff's osteopath that Plaintiff was still unable to work, and resolved the conflict against Plaintiff. The Secretary's regulations vest discretion in the Administrative Law Judge to weigh physicians' conclusory opinions. 20 C.F.R. § 404.1526; Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970). As trier of facts, it is the Secretary's responsibility to consider all the evidence, to resolve any conflicts in the evidence, and to decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F.Supp. 853 (D. Kan. 1968), aff'd, 416 F.2d 1257 (10th Cir. 1969).

The Secretary's decision also indicates that he gave careful consideration to Plaintiff's subjective complaints of pain, and resolved the issue against Plaintiff. Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965). Even though Plaintiff's conditions may prevent his doing the heavy labor he has done in the past he is not entitled to benefits, because the Social Security Act requires an inability to engage in any substantial gainful activity. Keller v. Mathews, 543 F.2d 624 (8th Cir. 1976); Waters v. Gardner, 452 F.2d 855 (9th Cir. 1971). As attested to by the vocational expert, many light and sedentary jobs exist that are within Plaintiff's vocational capabilities. Trujillo v. Richardson, supra.

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not entitled to disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 16th day of October, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. BOARD OF EDUCATION, INDEPENDENT SCHOOL DISTRICT NO. 1, TULSA COUNTY, OKLAHOMA, et al. Defendants	)	CIVIL ACTION NO. 68-C-185

FILED
OCT 16 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On April 18, 1979, the Board of Education of the defendant, Tulsa School District, adopted a Plan For Further Desegregation (the "Plan"), a copy of which is attached to this Order. The Plan was submitted to the United States Department of Justice for its approval. On June 29, 1979, representatives of the Tulsa School District met with representatives of the Department of Justice to discuss the implementation of the Plan. As a result of that meeting, the Department of Justice has stated that it will not object to the implementation of the Plan by the Tulsa School District. However, the Department of Justice states that the constitutional measure of the Plan's success is the effectiveness of the Plan. Because the effectiveness of the Plan cannot be evaluated until after its implementation, the Department of Justice does not at this time agree that the Plan satisfies what it views to be the constitutional obligation of the Tulsa School District. The Department of Justice also reaffirms its position that the Tulsa School District is obligated to take additional action to desegregate its public school system. The Tulsa School District states that it is prepared to implement the Plan, subject to the reservations expressed by the Department of Justice. The Tulsa School District further states that its adoption and

implementation of the Plan is not an admission that the Plan is constitutionally required and does not represent a modification of its position in this litigation that the predominately black student enrollment in both the schools affected by the Plan and those not affected by it results from factors other than actions of the Tulsa School District.

The Court has reviewed the Plan and finds that the Tulsa School District should be authorized to implement the Plan, subject to the reservations expressed by the Department of Justice.

It is therefore ordered that the Tulsa School District should be permitted to implement the attached Plan. All prior Orders herein are accordingly modified to that extent.

The Court retains jurisdiction herein to enter such other and further Orders as the Court deems appropriate in the future.

Dated this 12 day of October, 1979.

United States District Judge

Burtis M. Dougherty
Attorney, U.S. Department of Justice

Attorney for Plaintiff

David L. Fist

Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 74-C-302C
753.83 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and Estate of Eugene C. Mullendore, Jr., deceased, and Unknown Owners, Defendants.	)	All Tracts All Interests

FILED
OCT 15 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

1.

NOW, on this 15th day of October, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on the Report of Commissioners filed herein on July 24, 1979, and the Court, after having examined the files in this action and being advised by counsel for the parties, finds that:

2.

This judgment applies to the entire estates condemned in all tracts involved in this civil action, as such estates and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and the subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described

in such Complaint. Pursuant thereto, on July 23, 1974, the United States of America filed its Declaration of Taking of certain estates in such tracts of land, as described therein and in the said Complaint, and title to such property should be vested in the United States of America as of the date of filing such instrument.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the estates taken in the subject tracts a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 12.

7.

The Report of Commissioners filed herein on July 24, 1979, was adopted and affirmed by this Court by its Order entered herein on October 4, 1979. The amount of just compensation for the estates taken in the subject tracts, as fixed by the Commission, and adopted by the Court, is set out below in paragraph 12.

8.

This judgment will create a deficiency between the amount deposited as estimated just compensation for the estates taken in subject tracts and the amount fixed by the Commission and the Court as just compensation, and a sum of money sufficient to cover such deficiency should be deposited by the Plaintiff. This deficiency is set out below in paragraph 12.

9.

The defendants named in paragraph 12 as owners of the estates taken in subject tracts are the only defendants asserting any interest in such estates. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the estates condemned herein and, as such, are entitled to receive the just compensation awarded by this judgment.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to

condemn for public use the subject tracts, as such tracts are described in the Complaint filed herein, and such property, to the extent of the estates described in such Complaint, is condemned, and title thereto is vested in the United States of America, as of July 23, 1974, and all defendants herein and all other persons are forever barred from asserting any claim to such estates.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owners of the estates taken herein in subject tracts were the defendants whose names appear below in paragraph 12, and the right to receive the just compensation for such estates is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Report of Commissioners filed herein on July 24, 1979, hereby is confirmed and the sum therein fixed is adopted as the award of just compensation for the taking of the subject property, and should be allocated among the parties, as shown by the following schedule:

OWNERS:

Ownership No. I.

Consists of all tracts and estates taken therein except 1/2 interest in all minerals, including coal, oil and gas, under Tract No. 115E, (which tract contains 4.65 acres).

On the date of taking the owners were Eugene C. Mullendore and Kathleen B. Mullendore. However, Eugene C. Mullendore is now deceased and by operation of law certain other persons have succeeded to his interest in this case. Therefore, the persons now entitled to receive the just compensation for the estates taken in the subject property in this action are as follows, and the share of each owner in the total award is shown by the fraction following each owner's name:

1. Kathleen B. Mullendore ---------- 1/2
2. Katsy Mullendore Mecom, Trustee of Trust A under the Will of Eugene C. Mullendore ---------- 1/4
3. Katsy Mullendore Mecom, Trustee of Trust B under the Will of Eugene C. Mullendore ---------- 1/4

Ownership No. II.

Consists of 1/2 interest in all minerals, including coal, oil and gas, under Tract No. 115E only (which tract contains 4.65 acres).
Was owned by:

Donald W. Wilson
(Sole and only heir of Walter Wilson, deceased)

Award of just compensation, for all interests, pursuant to Commissioners' Report (This includes $4.00 for the mineral estate condemned in all of Tract 115E)	$481,531.00	$481,531.00
Allocation of total award:		
To Ownership No. I	$481,529.00	
To Ownership No. II	2.00	
Deposited as estimated compensation		$183,750.00
Deposit deficiency		$297,781.00

Disbursals and Balance due to owners:

I. Ownership No. I:

Disbursed to owners by Order of 1/19/77	$183,750.00
Balance due to owners	$297,779.00 plus interest

II. Ownership No. II:

Disbursed to owner	None
Balance due to owner	$2.00 plus interest

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall pay into the Registry of this Court for the benefit of the owners the deposit deficiency for the subject tracts as shown in paragraph 12, in the total amount of $297,781.00, together with interest on such deficiency at the rate of 6% per annum from July 23, 1974, until the date of deposit of such deficiency sum; and such sum shall be placed in the deposit for subject tracts in this civil action.

After such deficiency deposit has been made, the Clerk of this Court shall disburse the entire sum then on deposit for the subject tracts, as follows:

1. To Kathleen B. Mullendore the sum of $148,889.50 plus .49999793 of all accrued interest on the deposit deficiency as shown above.

2. To Katsy Mullendore Mecom, Trustee of Trust A under the Will of Eugene C. Mullendore, the sum of $74,444.75 plus .24999896 of all accrued interest on the deposit deficiency as shown above.

3. To Katsy Mullendore Mecom, Trustee of Trust B under the Will of Eugene C. Mullendore, the sum of $74,444.75 plus .24999896 of all accrued interest on the deposit deficiency as shown above.

4. To Donald W. Wilson the sum of $2.00 plus .00000415 of all accrued interest on the deposit deficiency as shown above.

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

TJE:mw
10/1/79

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

YORK MANUFACTURING COMPANY, a corporation,

Plaintiff,

vs.

DURA-STRUCTURES, INC., a corporation,

Defendant.

No. 78-C-62-C

FILED
OCT 15 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW ON this 15th day of October, 1979, the above-entitled matter came on regularly for hearing. Plaintiff appeared by and through its attorneys, Ungerman, Conner, Little, Ungerman & Goodman; Defendant appeared by its attorney, William R. Berger. Thereupon, the Court found that it had jurisdiction in the premises and that the Defendant had been duly served with summons and that the Court has jurisdiction over the parties and the subject matter of the cause.

Thereupon, the Court being fully advised in the premises found that the Defendant is indebted to the Plaintiff in the principal sum of $9,085.73 with interest thereon at the rate of 10% per annum from date of judgment until paid.

The Court further found that Defendant's Counter-Claim against Plaintiff should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff have and is hereby granted a judgment against the Defendant in the principal sum of $9,085.73 with interest thereon at the rate of 10% per annum from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Counter-Claim against Plaintiff is hereby dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

APPROVED:

UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN

THOMAS J. ELKINS, Attorney for Plaintiff

WILLIAM R. BERGER, Attorney for Defendant

FRED LIARDON, President, DURA-STRUCTURES, INC.

LAW OFFICES
UNGERMAN
CONNER,
LITTLE
UNGERMAN &
GOODMAN
1710 FOURTH NATIONAL
BANK BUILDING
TULSA, OKLAHOMA
74119

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J & B CONSTRUCTION, INC., Plaintiff,	)	
vs.	)	NO. 79-C-558-C
MID-CENTRAL CONSTRUCTORS, INC. Defendant.	)	

FILED
OCT 15 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

THIS MATTER coming before the undersigned on the 15th day of October, 1979, pursuant to the Motion to Dismiss filed by J & B Construction, Inc. and the Court being advised in the premises and noting that Mid-Central Constructors, Inc. has consented to the dismissal of this removal action;

IT IS THEREFORE ORDERED that the removal action filed herein by Mid-Central Constructors, Inc. is dismissed.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MELVIN ELLISON, Plaintiff, v. JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, Defendant.	)	No. 79-C-5-C

FILED
OCT 15 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education, and Welfare denying him the waiver of recoupment of overpaid disability insurance benefits he received to which he was not entitled. He asks that the Court reverse the decision and declare that the overpayment should not be recouped.

This matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued May 26, 1978. The Administrative Law Judge found that plaintiff was no longer disabled as of April, 1974, and that Plaintiff's entitlement to benefits, therefore, ended in June, 1974. The Administrative Law Judge further found that Plaintiff had received a total overpayment of $12,283.40. amd that the overpayment should be recouped because Plaintiff was not "without fault" in causing the overpayment.

Plaintiff maintains that he was "without fault" in causing the overpayment and that its recoupment should, therefore, be waived.

There is no dispute about Plaintiff's disability from November, 1968, to April, 1974. Plaintiff's disability during that period is attributable to bilateral, severe glaucoma. At the administrative hearing on Plaintiff's claim, Plaintiff conceded that with medication, his glaucoma was under good control. Although Plaintiff had lost all vision in the right eye, his vision in the left eye is correctable to 20/30. (Tr. 39-40, 150). Plaintiff's attorney also conceded at the administrative hearing that Plaintiff was not contesting the discontinuance of the disability benefits. (Tr. 38).

In his summary and evaluation of the evidence, the Administrative Law Judge noted that Plaintiff is successfully engaging in substantial gainful activity as a self-employed plumber. (Tr. 23-24). The evidence upon which the Secretary's decision was based included, among other evidence, Internal Revenue Service records, testimony of the plaintiff and documents from the Social Security Administration. (Tr. 10-13, 47-48, 110-117, 126-127).

In December, 1971, Plaintiff advised the Social Security Administration that he intended to attempt working as a self-employed plumber in January, 1972. Plaintiff apparently did begin that week, and gradually his business built up. (Tr. 99-104). On May 31, 1973, Plaintiff advised the Administration of his net and gross income for 1972, and said that his income thus far in 1973 was running at about the same level. (Tr. 105-106). The administration noted at that point that plaintiff's work had not yet reached a level that would be considered substantial gainful activity. (Tr. 107-

108). In July, 1973, the Administration advised Plaintiff that he was still etitled to benefits, because his earnings were not yet of a high enough level to preclude his continued benefits. The Administration's letter contained the following important notice:

> Now that you trial work period has ended, any changes in your work duties, hours worked, or earnings may affect your eligibility for benefits. For this reason, it is important that you notify us promptly if there is a change in your work, such as increased earnings or hours worked. You should also let us know if you feel that you have recovered from your disability. Please use the enclosed card to notify us.
>
> If you have any questions, or need help in filling out the enclosed card, please telephone or visit any Social Security Office. The people there will be glad to help you. You can find the telephone number and address in the telephone directory listed under "Social Security Administration", or you can ask for this information at your Post Office. If you visit a Social Security Office, please take this letter with you.

(Tr. 66).

Although advised of his obligation to promptly report any increase in his work and earnings, Plaintiff failed to do so. In considering the evidence, the Administrative Law Judge determined that by April, 1974, Plaintiff was engaging in substantial gainful activity, that Plaintiff's failure to promptly report his increased work and increased earnings refuted his claim that he was "without fault" in causing the overpayment in benefits to which he was not entitled and that waiver of the overpayment would be denied.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn there-

from are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberrry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351, F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D. S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's request for a waiver of the overpaid disability insurance benefits he received. The Court further

finds that the record contains substantial evidence to support his findings.

Recoupment of an overpayment of disability benefits can only be waived if:

1. the claimant is without fault in causing the overpayment; and,

2. recovery of the overpayment would defeat the purposes of Title II or would be against equity and good conscience. 42 U.S.C. § 404(b).

The Secretary's regulations further define the term "without fault" as including the claimant's "failure to furnish information which he knew or should have known to be material." 20 C.F.R. § 404.507. In addition, the regulations provide that, "An individual will not be 'without fault' if the Administration has evidence in its possession which shows either a lack of good faith or failure to exercise a high degree of care in determining whether circumstances which may cause deductions from his benefits should be brought to the attention of the Administration by the immediate report or by return of a benefit check." 20 C.F.R. § 404.511.

Plaintiff had the burden of proving that the overpaid social security benefits he received, to which he was not entitled because of his working, should not be collected. Sierakowski v. Weinberger, 504 F.2d 831 (6th Cir. 1974). In this case, there is ample, substantial evidence of record to support the Secretary's decision that Plaintiff failed to meet this burden of proof. Morgan v. Finch, 423 F.2d 551 (6th Cir. 1970).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is

the determination of the Court that Plaintiff is not in fact entitled to a waiver of recoupment of overpaid disability insurance benefits which he received and to which he was not entitled. Judgment is so entered for the Defendant.

Dated this 15th day of October, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIRGIL L. CROWDER and KLEO M. CROWDER,	)	
Plaintiffs,	)	
vs.	)	NO. 78-C-339-C
JAMES HAMPTON and JIM PARRISH,	)	
Defendants.	)	

FILED
OCT 12 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Upon the Join Application of the parties hereto, and each of them the Court finds that the said Dismissal With Prejudice should be permitted, and that the Order allowing Dismissal is hereby granted.

UNITED STATES DISTRICT JUDGE

10

FILED
OCT 11 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ALBERT MARTIN ARMSTRONG and ERMALEE ARMSTRONG, husband and wife; and HARRY O. COLBERT, JR. and RAYNELLE COLBERT, husband and wife, Defendants.	)	CIVIL ACTION NO. 79-C-496-C

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 11th day of October, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 11th day of October, 1979.

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES FORGECRAFT CORPORATION, an Arkansas corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-341-C
OKLAHOMA FARRIER'S COLLEGE INC., an Oklahoma corporation, THE FOUR 7'S INC., an Oklahoma corporation, and BUD BEASTON,	)	
Defendants.	)	

FILED
OCT 11 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Now on this 11th day of October, 1979, I the undersigned Judge of the United States District Court for the Northern District of Oklahoma, for good cause shown, find that an Order should be entered dismissing all causes of action pending herein, with prejudice to refiling same, for the reason that the parties hereto have settled their mutual differences.

It is therefore ordered that all causes of action are hereby dismissed with prejudice

JUDGE OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KATHLEEN MANIATIS,)
)
Plaintiff,)
)
vs.) No. 79-C-9-D
)
JOSEPH A. CALIFANO, JR.,)
SECRETARY OF HEALTH,)
EDUCATION AND WELFARE,)
)
Defendant.)

F I L E D

OCT 11 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Plaintiff, Kathleen Maniatis, brings this action pursuant to 42 U.S.C. §405(g) for the judicial review of Defendant's final administrative decision finding that Plaintiff was not under a "disability" as defined in the Social Security Act. Plaintiff has filed a Motion to Remand, which is supported by a brief, and Defendant has filed a brief opposing Plaintiff's motion.

In support of the motion, Plaintiff argues that subsequent medical developments show that she is unable to perform any work. Plaintiff has attached to her Reply Brief a letter from Dr. Pentacost, wherein the combined effects of Plaintiff's impairments are considered. Such evidence is not merely cumulative, Plaintiff contends, because prior medical evaluations did not consider the total impact of all of Plaintiff's problems. Plaintiff also points to the fact that she was not represented by counsel at the administrative hearing.

42 U.S.C. §405(g) provides that in order for a remand to be granted, plaintiff must show "good cause." Bradley v. Califano, 573 F.2d 28 (10th Cir. 1978); Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed.2d. 1164 (1968); Long v. Richardson, 334 F.Supp. 305 (W.D.Va. 1971); Dunn v. Richardson, 325 F.Supp.

337 (W.D.Mo. 1971); See Hope v. Secretary of Health, Education and Welfare, 347 F.Supp. 1048 (E.D.Tex. 1972). In determining whether good cause for a remand to the Secretary exists, it must be remembered that the Social Security Act is to be liberally construed as an aid to the achievement of its Congressional purposes and objectives and that narrow technicalities which thwart its purposes are not to be adopted. Schroeder v. Hobby, 222 F.2d 713 (10th Cir. 1955). In these circumstances, courts must not require such a technical showing of good cause as would justify the vacation of a judgment or the granting of a new trial. Wesley v. Secretary of Health, Education and Welfare, 385 F.Supp. 863 (D.D.C. 1974); Epperly v. Richardson, 349 F.Supp. 56 (W.D.Va. 1972); Martin v. Richardson, 325 F.Supp. 686 (W.D. Va. 1971); Sage v. Celebrezze, 246 F.Supp. 285 (W.D.Va. 1965); Blanscet v. Ribicoff, 201 F.Supp. 257 (W.D.Ark. 1962). Remand should be granted where no party will be prejudiced by the acceptance of additional evidence and the evidence bears on the matter in dispute. Epperly v. Richardson, supra; Martin v. Richardson, supra; Sage v. Celebrezze, supra; Blanscet v. Ribbicoff, supra. However, a claimant seeking remand must show the court any new evidence, or at least the general nature of such evidence, sought to be introduced upon remand. Bradley v. Califano, supra; Long v. Richardson, supra. Merely cumulative evidence is not a sufficient basis to justify remand, Bradley v. Califano, 573 F.2d 28 (Tenth Cir. 1978); Locklear v. Mathews, 424 F.Supp. 639 (D.Md. 1976); Schall v. Gardner, 308 F.Supp. 1125 (D.S.D. 1970); Morris v. Finch, 319 F.Supp. 818 (S.D.W.Va. 1969), and neither is the mere fact that Plaintiff was not represented by counsel at the administrative hearing, Heisner v. Secretary of Health, Education and Welfare, 538 F.2d 1329 (Eighth Cir. 1976); Green v. Weinberger, 500 F.2d 203 (Fifth Cir. 1974); Wilson v. Califano, 453 F.Supp. 79 (N.D.Tex.

1978); Ihnen v. Celebrezze, 223 F.Supp. 157 (D.S.D. 1963); Butler v. Folsom, 167 F.Supp. 684 (W.D.Ark. 1958).

In the instant case, it appears that Plaintiff's presentation of evidence was minimal, and that Joe Kalil, who acted as her representative as an accomodation offered by the office of U. S. Representative Ted Risenhoover, was unable, in the time available to him, to fully prepare for the hearing. Furthermore, the evidence of additional developments in Plaintiff's case, and the combined effect of her illnesses, was not previously considered by the Administrative Law Judge. This is new matter having a bearing upon the matter in dispute. As neither party will be prejudiced by the acceptance of additional evidence in this case, the Court finds and concludes that Plaintiff's Motion to Remand should be granted. Accordingly, the Clerk of the Court is directed to take the necessary steps to effect the remand of this case.

It is so Ordered this 11th day of October, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KATHY LEE, individually and as Administratrix on behalf of the Estate of Anthony Paul Lee, deceased, and Delainna Lee, Brandi Lee and Kamiron Lee, minors by and through their mother and next of friend, Kathy Lee,

Plaintiffs,

vs.

HAROLD LEE HARRINGTON,

Defendant.

79-C-57-C

FILED
OCT 11 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion to Reconsider filed by the plaintiffs, wherein plaintiffs request the Court to review one additional deposition [the depositions of Danny Dixon and plaintiff having previously been reviewed by the Court] not filed at the time the Court entered its Order of August 14, 1979, sustaining the defendant's Motion to Dismiss for Lack of Jurisdiction. The Court has now reviewed the deposition of Karron Carter and is not persuaded that the minimal contact necessary to establish jurisdiction is present in this litigation.

Title 12 O.S. §187 provides, in pertinent part:

> Any person, ... whether or not such party is a citizen or resident of this State and who does, or who has done, any of the acts hereinafter enumerated, whether in person...., submits himself, or shall have submitted himself,...., to the jurisdiction of the courts of this State as to any cause of action arising, or which shall have arisen, from the doings of any of said acts: ....
>
> (2) the commission of any act within this State;....

It appears from the evidence adduced by way of depositions and the pleadings that Anthony Paul Lee and Harold Lee Harrington, both citizens of the State of Arkansas, were involved in a one-car accident in the State of Arkansas, wherein Harold Lee Harrington was the driver and Anthony Paul Lee was a passenger. As a result of this accident, Anthony Paul Lee lost his life. It is the contention of the plaintiffs that on the day of the accident, the two men crossed over the border from Arkansas to Oklahoma, where they consumed a quantity of beer and/or alcoholic beverages [there is also testimony that marijuana smoking might have been involved]. After their sojourn of some 7 to 7-1/2 hours within the State of Oklahoma, the two men entered the vehicle and crossed over to the State of Arkansas, where the accident occurred. The only contact then with the State of Oklahoma was that period of time they spent in Oklahoma as hereinabove delineated.

The specific acts of negligence alleged by the plaintiffs in their complaint are as follows:

> (a) That the defnedant(sic) did improperly control the vehicle and did not use the control mechanisms, lights or other portions of the vehicle to execute control of the vehicle and did lose control and therefore did cause the accident and death of the decedent.
>
> (b) Plaintiff further alleges that the defendant was intoxicated at the time of the accident without the knowledge of the decednet(sic) or plaintiff because of which he was unable to control the vehicle.
>
> (c) Plaintiff further alleges that the defendant did conduct the car in such a reckless and wanton manner as to be unable to control it for the conditions of the road at the time the accident occurred.
>
> (d) Plaintiff further alleges that the speed of the vehicle at the time of impact was such that it was in excess of speed limit and was not under the control of the decedent at the time of the accident.

The crucial question before the Court on the Motion to Reconsider is whether the consumption of the alcoholic beverages during a period of 7 to 7-1/2 hours within the State of Oklahoma will rise to the dignity of a minimum contact that will vest this Court with in personam jurisdiction pursuant to 12 O.S. §182(2).

The burden of proof rests upon the party asserting the existence of jurisdiction. Standard Life & Acc. Ins. Co. v. Western Finance, Inc., 436 F.Supp. 843 (USDC WD Okl. 1977); Wilshire Oil Company of Texas v. Riffe, 409 F.2d 1277 (10th Cir. 1969); Radiation Researchers, Inc. v. Fischer Industries, Inc., 70 F.R.D. 561 (USDC WD Okl. 1976).

This burden is met by a prima facie showing that jurisdiction is conferred by the long-arm statute. Standard Life & Acc. Ins. Co. v. Western Finance, Inc., supra; Block Industries v. DHJ Industries, Inc., 495 F.2d 256 (8th Cir. 1974); O'Hare International Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971).

Oklahoma has stated that "[T]he test for applying Long-Arm jurisdiction in Oklahoma is to determine whether the exercise of jurisdiction is authorized by statute, and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okl. 1978), cert. granted Feb. 21, 1979, 47 LW 3554 (#78-1078), set for oral argument in tandem with 78-952, Rush v. Savchuk, week of October 1, 1979, 48 LW 3172.

It has been held that 12 O.S. §§187 and 1701.01 et seq. are jurisdictionally the same. "....§1701.03 authorizes in personam jurisdiction to the outer limits of due process when and only when the asserted cause of action arises from the defendant's activities within the state." George v. Strick Corporation, 496 F.2d 10 (10th Cir. 1974); Roberts v. Jack Richards Aircraft Co., 536 P.2d 353, 355 (Okl. 1975). The record must show a voluntarily committed act of the defendant by which the defendant purposefully availed himself of the privilege of conducting activities within the State so as to invoke the benefits and protection of the laws of Oklahoma. Roberts v. Jack Richards Aircraft Co., supra; Crescent Corporation v. Martin, 443 P.2d 111 (Okl. 1968).

The action asserted by the plaintiffs herein has a tortious origin and arises from the alleged injury itself. The cause of action or claim arises from the automobile accident wherein Anthony Paul Lee lost his life. The action does not arise from the consumption of alcoholic beverages [and possibly marijuana] within the State of Oklahoma. The contacts alleged by the plaintiffs all deal with the consumption of alcohol [and marijuana] within the State of Oklahoma. The automobile accident did not arise from such contacts. cf. Bruce v. Fairchild Industries, Inc., 413 F.Supp. 914 (USDC WD Okl. 1974).

In Newby v. Williams Transfer Co, 415 F.Supp. 987 (USDC WD Okl. 1975), companion cases were brought in the Oklahoma District Court for injuries arising out of a collision between two motor vehicles in the State of Arkansas. The cases were removed to Federal Court. On a Motion to Dismiss or Transfer of the defendant motor vehicle owner, the Court held that where the causes of action arose from the allegedly negligent operation of a motor vehicle by owner's agent in the State of Arkansas and one of the allegedly negligent conduct complained of occurred while the motor vehicle was being driven through the State of Oklahoma, the fact that the motor vehicle had been driven through the State of Oklahoma before reaching the State of Arkansas was not relevant to the accident for jurisdictional purposes and could not be the basis for in personam jurisdiction over the nonresident owner under the Oklahoma long-arm statutes. At page 990 the Court said:

> The simple question for consideration by this Court is whether the causes of action in the instant cases arose from the same acts Plaintiffs allege subjects Defendant to the jurisdiction of the Oklahoma Courts. The causes of action arise from the alleged negligent conduct in the operation of a motor vehicle by Defendant's agent near North Little Rock, Arkansas. The act of Defendant upon which they assert it is subject to the jurisdiction of this Court is that said motor vehicle had been driven through Oklahoma prior to the time of the accident. Again, assuming such allegation is true, none of the alleged negligent conduct complained of occurred while said motor vehicle was being driven through Oklahoma. The fact that a motor vehicle had been driven through Oklahoma before reaching the state in which an accident occurs is not relevant to the accident for jurisdictional purposes. Conduct prior to the time of the accident wholly unrelated to the negligent acts complained of

cannot be the basis for in personam jurisdiction under the Oklahoma long arm statutes....

The Court, therefore, finds that under the facts in this case and the prevailing law applicable thereto, the plaintiffs' Motion to Reconsider should be overruled.

IT IS, THEREFORE, ORDERED that the plaintiffs' Motion to Reconsider be and the same is hereby overruled.

ENTERED this 11th day of October, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NORTHWEST BANK OF OKLAHOMA CITY, Plaintiff vs. BETTY SUE HINES, et al., Defendants vs. UNITED STATES OF AMERICA, Plaintiff on Cross-claim and Counter-claim vs. BETTY SUE HINES, et al., Defendants on Cross-claim and NORTHWEST BANK OF OKLAHOMA CITY, Defendant on Counterclaim.	Civil No. 78-C-320-~~B~~C

FILED
[illegible]
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

This cause came on to be heard on the motion of plaintiff, Northwest Bank of Oklahoma City, for a summary judgment against the defendant, Leroy D. Hines, as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the Court from the pleadings and evidence in this cause that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

The Court further finds that the mortgage lien of plaintiff, Northwest Bank of Oklahoma City, in and to the following described real property, to-wit:

The (W/2) of the (N/2) of the (N/2) of the (NE/4) of the (NE/4) of Section 33, Township (18) North, Range 13E of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the United States Government Survey thereof,

is prior and superior to the right, claim and interest of the defendant, Leroy D. Hines, in and to the premises.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the mortgage of plaintiff, Northwest Bank of Oklahoma City, be and the same is hereby established and adjudged to be a good and valid lien upon the premises, prior and superior to the right, title, interest and lien of the defendant, Leroy D. Hines, and all persons claiming under him since the filing of the petition in this suit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Order of the Court filed January 30, 1979, which Order stayed any disposition of the subject property, be, and the same is hereby vacated, set aside and held for naught, and upon failure of said defendants, or any of them, to satisfy the judgment of the plaintiff, the Federal Marshall for the Northern Distrist of Oklahoma shall levy upon the premises and after having the same appraised as provided by law, shall sell said premises to the highest bidder, and shall immediately turn over the proceeds thereof to the District Court Clerk who shall apply the proceeds arising from said sale as follows:

1. In payment of costs of said sale and of this action; and in payment of the ad valorem taxes due to the Tulsa County Treasurer.

2. In payment to the plaintiff in the full sum of its judgment with all accrued interest, costs, abstracting and attorney's fees.

3. The residue, if any, shall be held by the Clerk of this Court to await the further order of this Court, subject to the right of the United States of America to redeem under 28 USC §2410.

and that portion of the Journal Entry of Judgment filed herein on December 29, 1979, which conflicts with this provision concerning the disposition of the proceeds of said sale is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that from and after the sale of said real estate under and by virtue of the judgment and decree entered herein on December 29, 1978, that Leroy D. Hines, and all persons claiming under him, be and they are hereby forever barred and foreclosed of and from any and every lien upon, right, title, interest or equity of redemption in or to said real estate, or any part thereof.

(Signed) H. Dale Cook

JUDGE OF THE FEDERAL DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT L. SUTTON, Plaintiff,	)	
vs.	)	No. 78-C-464-C
HILTI, INC., Defendant.	)	

FILED
OCT 9 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL OF PLAINTIFF'S COMPLAINT

ON THIS 9TH day of September, 1979, upon the written stipulation of the Plaintiff for a dismissal with prejudice of the Plaintiff's Complaint, the Court having examined said stipulation, finds the parties have entered into a compromise settlement of all of the claims involved herein, and the Court being fully advised in the premises finds that the Plaintiff's Complaint against the Defendant should be dismissed with prejudice.

IT IS THEREFORE ORDERED by the Court that the Complaint of the Plaintiff against the Defendant be and the same is hereby dismissed with prejudice to any future action.

UNITED STATES DISTRICT JUDGE

36

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS G. VANCE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 79-C-161-C
	)	
HELMERICH & PAYNE, INC., a corporation,	)	
	)	
Defendant.	)	

FILED
OCT 9 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

On this 9th day of October, 1979, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

JOHN F. McCORMICK, JR.,

Attorney for the Plaintiff

ALFRED B. KNIGHT,

Attorney for the Defendant.

Thomas G. Vance, Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 4 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

BOBBY JOE RICHARDSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 75-C-473-D

ORDER

NOW on this 4 day of October, 1979, there came on for consideration the Stipulation for Dismissal previously filed by the parties herein. Based upon such Stipulation and based further upon Plaintiff's attorney's representation that the sum of $2,500.00, which sum includes attorney's fees to be received by Plaintiff's attorney, has been received by the Plaintiff, Bobby Joe Richardson, from the Defendant, United States of America,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed with prejudice.

Fred Daugherty
UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ Kainor Carson
KAINOR CARSON
Attorney for Bobby Joe Richardson

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ROGER A. GALLOWAY a/k/a ROGER GALLOWAY, PAUL HUGHES, BUSS BAYOUTH d/b/a NAIFEH GROCERY MARKET, PIONEER FINANCIAL SERVICES CORPORATION, and CAROLYN GALLOWAY, Defendants.	)	CIVIL ACTION NO. 79-C-196-C

FILED
OCT 4 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 4th day of October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the Defendant, Pioneer Financial Services Corporation, appearing by its attorney, Joseph F. Lollman; the Defendant, Paul Hughes, appearing pro se; and, the Defendants, Roger A. Galloway a/k/a Roger Galloway, Carolyn Galloway, and Buss Bayouth d/b/a Naifeh Grocery Market, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Pioneer Financial Services Corporation, was served with Summons and Complaint on April 12, 1979; that Defendant, Buss Bayouth d/b/a Naifeh Grocery Market, was served with Summons and Complaint on April 13, 1979; that Defendant, Paul Hughes, was served with Summons and Complaint on April 17, 1979; all as appears on the United States Marshal's Service herein; and, that Defendants, Roger A. Galloway a/k/a Roger Galloway and Carolyn Galloway, were served by publication as shown on the Proof of Publication filed herein.

It appearing that the Defendant, Paul Hughes, has duly filed his Answer herein on April 26, 1979; that the Defendant, Pioneer Financial Services Corporation, has duly filed its Answer and Cross-Complaint herein on April 27, 1979; and, that Defendants, Roger A. Galloway a/k/a Roger Galloway, Carolyn Galloway, and

Buss Bayouth d/b/a Naifeh Grocery Market, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifteen (15), Block One (1), SUBURBAN ACRES FOURTH ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Roger A. Galloway, did, on the 26th day of March, 1976, execute and deliver to the Administrator of Veterans Affairs, his mortgage and mortgage note in the sum of $9,400.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Roger A. Galloway, made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of $9,346.30 as unpaid principal with interest thereon at the rate of 9 percent per annum from June 1, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Paul Hughes, is entitled to judgment against Defendant, Roger Galloway, in the amount of $112.00 plus $15.00 court costs, plus interest at the rate of 6 percent per annum from the date of the judgment (April 14, 1975), but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, Pioneer Financial Services Corporation, is entitled to judgment against Defendants, Roger A. Galloway and Carolyn Galloway, in the amount

$3,197.21, together with interest thereon at the rate of 19.39 percent per annum from date, until date of judgment, plus a reasonable attorney's fee of 15 percent of the amount found owing and costs of this action, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Roger A. Galloway, in rem, for the sum of $9,346.30 with interest thereon at the rate of 9 percent per annum from June 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Paul Hughes have and recover judgment, in rem, against the Defendant, Roger Galloway, in the amount of $112.00 plus $15.00 court costs, plus interest at the rate of 6 percent per annum from April 14, 1975, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Pioneer Financial Services Corporation have and recover judgment, in rem, against the Defendants, Roger A. Galloway and Carolyn Galloway, in the amount of $3,197.21, together with interest thereon at the rate of 19.39 percent per annum from date, until date of judgment, plus a reasonable attorney's fee of 15 percent of the amount found owing and costs of this action, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Buss Bayouth d/b/a Naifeh Grocery Market and Carolyn Galloway.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money

judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

BY: ROBERT P. SANTEE
Assistant United States Attorney

JOSEPH F. LOLLMAN
Attorney for Defendant,
Pioneer Financial Services Corporation

PAUL HUGHES, pro se

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

GRAND RIVER DAM AUTHORITY,	)	
	)	
Plaintiff,	)	
	)	Jack C. Silver, Clerk
vs.	)	No. 78-C-488-C U. S. DISTRICT COURT
	)	
NIPAK, INC.,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL OF PLAINTIFF'S
COMPLAINT AND DEFENDANT'S COUNTER-CLAIM

On this 4 day of October, 1979, upon the written stipulation of the parties for a dismissal with prejudice of the plaintiff's complaint and the defendant's counter-claim, the Court having examined said stipulation, finds the parties have entered into a compromise settlement of all of the claims involved herein, and the Court being fully advised in the premises finds that the plaintiff's complaint against the defendant and the defendant's counter-claim against the plaintiff should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the complaint of the plaintiff against the defendant and the counter-claim of the defendant against the plaintiff be and the same are hereby dismissed with prejudice to any future action.

H. Dale Cook

UNITED STATES DISTRICT JUDGE

FILED
OCT 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM B. TANNER COMPANY, INC.,	)	
	)	
Plaintiff,	)	78-C-463-C
	)	
vs.	)	
	)	
JACK POWELL, d/b/a POWELL BROADCASTING COMPANY,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

Based on the Order filed this date, IT IS ORDERED THAT Judgment be entered in favor of the plaintiff, WILLIAM B. TANNER COMPANY, INC., in the amount of $24,350.00, plus interest at the rate of 6% per annum from March 27, 1975, until the date of this judgment, and interest at the rate of 10% per annum from this date until the Judgment is paid, and against the defendant, JACK POWELL, d/b/a POWELL BROADCASTING COMPANY.

ENTERED this 3rd day of October, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM B. TANNER COMPANY, INC.,	)	
	)	
Plaintiff,	)	78-C-463-C
	)	
vs.	)	
	)	
JACK POWELL, d/b/a POWELL BROAD-CASTING COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

Plaintiff has filed a Motion for Summary Judgment and defendant has failed to respond thereto (the last extension having expired on August 10, 1979, and no further extensions having been requested or granted).

The case is now ready for dispositive ruling by the Court. The pre-trial order entered in this action reveals that there are no disputed questions of fact. The Court has reviewed the entire file, including the affidavit of James Gilbert, Vice-President of plaintiff, and all exhibits, and, being fully advised in the premises, finds:

On March 25, 1974, an agreement was executed between Paul O'Dell and Jack Powell d/b/a Powell Broadcasting Company. Under said agreement Powell purchased "all of Seller's interest in and to....the radio station [KNFB-FM] and property used in connection with such radio station", and the agreement further provided:

> 2. PURCHASER TO ASSUME LIABILITIES OF RADIO STATION:
>
> In further consideration of Seller's conveying and transferring as set forth herein, Purchaser hereby agrees to assume all indebtedness of said radio station, outstanding at the execution of this Agreement either known or unknown to Seller, and further agrees to hold Seller harmless from same.

The file reveals that there were in fact three outstanding contracts as will be hereinafter delineated.

On December 9, 1965, Pepper Sound Studios, Inc., and the "owner and operator of RADIO BROADCASTING STATION KNFB-FM located at Nowata Oklahoma" entered into a lease agreement. The lease, signed by the treasurer of the station, Pat DeLosier, was to run for a term of 156 weeks, renewable once for an additional 156 weeks unless written notice of intent to terminate were given to Pepper. The lessee agreed to pay $39.50 per month for the term of the lease and to provide air time to Pepper for 780 spot advertisements per year. Pepper Sound Studios, Inc., pursuant to said lease, produced and delivered to KNFB-FM an initial package and 10 new productions per month for the duration of the lease, but that the station failed to provide 2340 spots for which it was obligated under the contract. Eact of the 2340 spots not provided has a standard value of $2.13, which value is set forth in a trade publication called Rate and Data Service. Tanner's damages for breach of this contract are $4,984.00, plus interest at the rate of 6% from March 27, 1975, the date said packages were returned by defendant to the plaintiff, and interest at the rate of 10% from the date of judgment.

In September, 1970, Pepper and Tanner, Inc., signed a 10-year lease agreement (terminable after 5 years) with the "owner or operator of Radio Broadcasting Station KNFB-FM" under which agreement Pepper-Tanner agreed to provide promotional materials to the station in exchange for cash payment by the station of $612.00 per year, payable at $51.00 per month. In addition, the station was to provide Pepper-Tanner with 780 one-minute spots per year. As part of the agreement, Paul O'Dell signed five promissory notes as "owner" of the station, each note being for $612.00 and each note being payable at the end of the anniversary date of the contract's commencement (November 1, 1970). Tanner seeks damages as a result of this agreement in the total sum of $11,213.00, consisting of cash due of $3,060.00 and cash value of the

advertising spots to be made available under the contract--- 3,900 spots due, less 72 spots used in 1973; 3,828 net spots valued at $2.13 each, or a total net cash value of $8,153.00, plus interest at the rate of 6% from March 27, 1975, the date the said packages were returned by defendant to the plaintiff, and interest at the rate of 10% from the date of judgment.

In June, 1973, Airplay International, a Division of Pepper & Tanner, Inc., and "the owner or operator of Radio Broadcasting Station KNFB-FM" by Dave McGuire, general manager, entered into an agreement that was to commence on September 1, 1973. Under this agreement Airplay agreed to deliver to the station Airplay's contests and promotions, and the station agreed to pay $660.00 per year ($55.00 per month) for ten years and to give Pepper and Tanner, Inc., 520 one-minute spots per year. The station also executed five installment notes in the amount of $660.00 each, payable at the end of each year following September, 1973. Tanner seeks damages as a result of this agreement in the total sum of $8,838.00, consisting of cash due in the amount of $3,300 and the cash equivalent of 2,600 spots valued at $2.13 each, for a total value of $5,538.00, plus interest at the rate of 6% from March 27, 1975, the date said packages were returned by defendant to plaintiff, and interest at the rate of 10% from the date of judgment.

In ITT Indus. Credit Co. v. L-P Gas Equipment, Inc., 453 F.Supp. 671, 675 (USDC WD Okl. 1978), the Court said:

> ....It was not necessary that Plaintiff be specifically named in the Contract for sale in order to recover thereon. United States v. State Farm Mutual Automobile Insurance Co., 544 F.2d 789 (Tenth Cir. 1972); Lawrence Nat. Bank v. Rice, 82 F.2d 28 (Tenth Cir. 1936); 17 Am.Jur.2d Contracts §313 (1965); 17 A C.J.S. Contracts §519(4) (1963). The contract established that the buyers were to assume certain liabilities of Belcher, and the facts and circumstances surrounding the transaction show clearly that the Plaintiff was a member of the class of creditors to whom Belcher was indebted....

In Baker-Hanna-Blake Co. v. Paynter-McVicker Groc. Co., 73 Okl. 22, 174 P. 265 (1918) the Court said that where one sells his business and the buyer undertakes to pay debts of the Seller, an actio

by the creditor lies against the buyer on his promise.

See also Corbin on Contracts, §788 at 108-10 (1951):

> Where one sells his business....or other property and the buyer undertakes to pay the seller's debts, an action by a creditor lies against the buyer on his promise. And this is true even though the creditor who sues may not have been specifically pointed out.

The Court treats such contracts as third-party beneficiary contracts.

The Court, therefore, finds that under the facts in this case, the enforcement of the contracts is proper on behalf of the plaintiff against the defendant.

The file reveals that plaintiff's action was commenced within 5 years of the assumption agreement by Powell in 1974. 12 O.S. §95. In Lawrence Nat. Bank v. Rice, 82 F.2d 28 (10th Cir. 1936) the Court said:

> Where an action has been brought, upon the promise of a third person to assume and pay the debt of the promisee, within the statutory period after such promise was made, the fact that the original debt had become barred by the statute of limitations when such action was commenced, is no defense thereto.

See also United States v. Scott, 167 F.2d 301 (8th Cir. 1948).

There being no genuine issue as to any material fact, the Court finds, pursuant to Rule 56, F.R.Civ.P. that Summary Judgment should be entered in favor of the plaintiff and against the defendant. Associated Press v. Cook, 513 F.2d 1300 (10th Cir. 1975).

This Order will be considered as Findings of Fact and Conclusions of Law of the Court.

IT IS, THEREFORE, ORDERED that the Plaintiff's Motion for Summary Judgment be and the same is hereby sustained.

IT IS FURTHER ORDERED, if plaintiff still intends to pursue attorney fees, that it file a proper application delineating such fees for determination by the Court. Such application should be filed within 10 days from this date and defendant will have 10 days thereafter to respond.

ENTERED this 3rd day of October, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

GENE L. HART,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 79-C-141-C
	)	
SIDNEY D. WISE, et al,	)	
	)	
Defendant.	)	

APPLICATION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES GENE L. HART and moves this cause of action against Glen H. (Pete) Weaver be dismissed for the reason that Plaintiff is now deceased and cause of action could not be maintained against the Defendant, Weaver.

WHEREFORE, Defendant respectfully requests this Motion be sustained.

Respectfully submitted,

Garvin A. Isaacs

OCT 3 1979

Garvin A. Isaacs
ATTORNEY FOR PLAINTIFF
2624 Classen Blvd.
Oklahoma City, Oklahoma 73106
(405) 525-8856

ORDER

Comes on for hearing this 27th day of September, 1979, the Application of the Plaintiff to Dismiss his cause of action against Glen H. (Pete) Weaver. Wherefore, premises considered, it is the order of the Court that the above styled and numbered cause against Glen H. (Pete) Weaver be and hereby is dismissed.

H. DALE COOK, DISTRICT JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Application and Order was served on Tony Jack Lyons, P. O. Drawer 1047, Pryor, Oklahoma 74361 and Mr. Sidney D. Wise, 17 Memorial Drive, Claremore, Oklahoma 74107, on this 1st day of October, 1979, by prepaid postage at the above addresses.

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Garvin A. Isaacs
GARVIN A. ISAACS

24

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and JAMES K. FRAZER, Special Agent Internal Revenue Service, Petitioners, vs. MERCANTILE BANK AND TRUST and BARBARA JOSLIN, Operations Officer, Respondents.	)	No. 79-C-228-C
UNITED STATES OF AMERICA and JAMES K. FRAZER, Special Agent Internal Revenue Service, Petitioners, vs. BANK OF TULSA and LARRY EULERT, Assistant Vice President, Respondents.	)	No. 79-C-229-C

FILED
OCT 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENTS
AND DISMISSAL

On this 3rd day of October, 1979, Petitioners' Motion to Discharge Respondents and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Respondents, Mercantile Bank and Trust and Barbara Joslin; and Bank of Tulsa and Larry Eulert, be and they are hereby discharged from any further proceedings herein and this action is hereby dismissed.

(Signed) Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and JAMES K. FRAZER, Special Agent Internal Revenue Service, Petitioners, vs. MERCANTILE BANK AND TRUST and BARBARA JOSLIN, Operations Officer, Respondents.	)	No. 79-C-228-C
UNITED STATES OF AMERICA and JAMES K. FRAZER, Special Agent Internal Revenue Service, Petitioners, vs. BANK OF TULSA and LARRY EULERT, Assistant Vice President, Respondents.	)	No. 79-C-229-C

FILED
OCT 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENTS
AND DISMISSAL

On this 3rd day of October, 1979, Petitioners' Motion to Discharge Respondents and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Respondents, Mercantile Bank and Trust and Barbara Joslin; and Bank of Tulsa and Larry Eulert, be and they are hereby discharged from any further proceedings herein and this action is hereby dismissed.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT GARY STAGMAN,
Executor of the Estate of
Joseph Stagman, Deceased,

and

I. J. STAGMAN,
Executor of the Estate of
Dolyne Stagman, Deceased,

Plaintiffs,

vs.

SHEL-MAR TRUCKING COMPANY
and MICHAEL W. PRESBAUGH,

Defendants.

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 79-C-215-D

ORDER

NOW, on this 2 day of Oct, 1979, this matter coming on before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma, upon plaintiffs' Motion to Dismiss their causes of action against the defendant, MICHAEL W. PRESBAUGH, and the Court having learned through counsel that the said MICHAEL W. PRESBAUGH is now deceased, and it appearing to the Court that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' causes of action be, and the same are dismissed without prejudice as to the defendant, MICHAEL W. PRESBAUGH, deceased.

S/ FRED DAUGHERTY

UNITED STATES DISTRICT JUDGE.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOYD FINNELL, Plaintiff,	)	
vs.	)	No. 79-C-358-D
GENERAL MOTORS CORPORATION, a Corporation, and STUNKARD MOTORS, INC., a Corporation, Defendants.	)	

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration Plaintiff's Motion to Remand. This action was commenced in the District Court of Craig County, State of Oklahoma. Plaintiff alleges that he purchased a Buick automobile from Defendant Stunkard Motors, relying upon the representations of Defendants that this automobile was a new Buick, when in fact, the automobile had an Oldsmobile engine. Plaintiff seeks to have this purchase rescinded in his first cause of action and seeks punitive and exemplary damages in his second.

Service was had upon Defendant Stunkard Motors by serving the Oklahoma Secretary of State. Stunkard Motors had no registered service agent, its prior one having died and no new agent being appointed. Furthermore, the charter of Stunkard Motors was suspended on April 13, 1978 for failure to pay the franchise tax.

In diversity actions, the matter of whether proper service has been obtained on a defendant is based on Oklahoma law. Walker v. Field Enterprises, Inc., 222 F.Supp. 282 (W.D.Okla. 1963), aff'd, 332 F.2d 632 (Tenth Cir. 1964).

Under Okla.Stat. tit. 18, §1.17, service upon the Secretary of State is sufficient if a domestic corporation has failed, "for any reason whatsoever," to maintain a registered agent. This statute also provides that "such

service of process shall be sufficient to give jurisdiction of the corporation to any court in this State having jurisdiction of the subject matter of the cause."

Where a corporation's charter has been cancelled or has expired, Okla.Stat. tit. 18 §1.198b provides that service may be had upon the corporation by serving the Secretary of State. In this case, Stunkard Motors' charter was suspended. Suspension of a corporation's charter for failure to pay the franchise tax is provided for by Okla.Stat. tit. 68, §1212. Even though Okla.Stat. tit. 18, §1.198b does not explicitly state that it applies where a corporation's charter has been "suspended," it does state that it is applicable when "the charter of any domestic corporation . . . has been cancelled . . . by order of the . . . Oklahoma Tax Commission . . ." It is clear from the statute that a corporation whose charter has been "suspended" is no different from one whose charter has been "cancelled," at least in terms of obtaining service upon the corporation by serving the Secretary of State.

As Plaintiff's motion to remand is presently before the Court, the burden of proof is on the Defendants, as the removing parties, to show that this action was properly removed. P. P. Farmers' Elevator Co. v. Farmers Elevator Mutual Insurance Co., 395 F.2d 546 (Seventh Cir. 1968); Williams v. Tri-County Community Center, 323 F.Supp. 286 (S.D.Miss. 1971), aff'd, 452 F.2d 221 (Fifth Cir. 1971); Heymann v. Louisiana, 269 F.Supp. 36 (E.D.La. 1967). Where there is any substantial doubt concerning jurisdiction of the federal court on removal, the case should be remanded and jurisdiction should be retained only where it is clear. See Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); Morrison v. Jack Richards Aircraft Co., 328 F.Supp. 580 (W.D.Okla. 1971); Williams v. Tri-County Community Center, supra; see Jerro v. Home Lines, Inc.,

377 F.Supp. 670 (S.D.N.Y. 1974).

Inasmuch as it appears that there is no diversity between Plaintiff and Defendant Stunkard Motors, Inc., this Court is without jurisdiction and this case was improvidently removed. It should accordingly be remanded to the state court from which it was removed, 28 U.S.C. §1447(c).

Plaintiff's Motion to Remand is hereby sustained and the Court remands this case to the State District Court of Craig County, Oklahoma. The Clerk of the Court is hereby directed to take the necessary action to remand this case without delay.

It is so Ordered this 2 day of October, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WALTER E. HALL,	)	
	)	
Plaintiff,	)	77-C-507-C
	)	
vs.	)	
	)	
W. B. YORK, et al.,	)	
	)	
Defendants.	)	

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion to Dismiss filed by James Inhofe, Mayor, City of Tulsa; Jack Purdie, Police and Fire Commissioner, City of Tulsa; Ron Young, Finance Commissioner, City of Tulsa; and Harry Stege, Chief of Police, City of Tulsa, pursuant to Rule 12(b)(6), F.R.Civ.P., and Plaintiff's response, wherein he confesses said Motion.

Additionally, the Court notes that on September 20, 1979, plaintiff filed his Third Amended Complaint, wherein it appears that he asserts an alleged claim against W. B. York, a police officer with the City of Tulsa Police Department, only.

The Court, therefore, finds that the Motion to Dismiss hereinabove referenced should be sustained and the cause of action and complaint dismissed as to the moving defendants.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by James Inhofe, Mayor, City of Tulsa, Jack Purdie, Police and Fire Commissioner, City of Tulsa; Ron Young, Finance Commissioner, City of Tulsa, and Harry Stege, Chief of Police, City of Tulsa, be and the same is hereby sustained and the cause of action and complaint are hereby dismissed as to the moving defendants.

ENTERED this 12th day of October, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GLENDA M. PAYNE,	)	CIVIL NO. 79-C-543-D
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 2 day of ~~September~~ Oct, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Glenda M. Payne, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Glenda M. Payne, was personally served with Summons and Complaint on August 31, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Glenda M. Payne, for the sum of $1,353.99 as of August 9, 1979, plus interest from and after said date, and the costs of this action accrued and accruing.

S/ FRED DAUGHERTY

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
JAMES ALEXANDER, JR., Defendant.	)	CIVIL NO. 79-C-539-D

DEFAULT JUDGMENT

This matter comes on for consideration this 2 day of ~~September,~~ Oct 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, James Alexander, Jr., appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, James Alexander, Jr., was personally served with Summons and Complaint on August 28, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, James Alexander, Jr., for the sum of $1,582.17 as of July 3, 1979, plus interest from and after said date, and the costs of this action accrued and accruing.

S/ FRED DAUGHERTY

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-C-537-D
	)	
RANDALL S. BARRETT, a/k/a RANDALL STEELE BARRETT,	)	
	)	
Defendant.	)	

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for consideration this 2nd day of ~~September~~ October, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Randall S. Barrett, a/k/a Randall Steele Barrett, appearing by his attorney, Don L. Gilder.

The Court being fully advised and having examined the file herein finds that Defendant, Randall S. Barrett, a/k/a Randall Steele Barrett, was personally served with Summons and Complaint on August 31, 1979, and that Defendant has duly filed his Answer herein on September 17, 1979, confessing Judgment.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover Judgment against Defendant, Randall S. Barrett, a/k/a Randall Steele Barrett, for the sum of $827.30, plus interest and the costs of this action accrued and accruing.

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

DON L. GILDER
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIMMY D. LASTER,

Plaintiff,

vs.

HARRY STEGE, Chief of Police, Tulsa Police Department; THE HONORABLE MARGARET LAMM, Judge of the District Court, Criminal Division, Tulsa County, Oklahoma,

Defendants.

No. 79-C-116-D

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration the motions for summary judgment of Defendants Lamm and Stege. These motions were originally filed by Defendants as motions to dismiss under Rule 12(b), Fed.R.Civ.P., but were ordered treated as motions pursuant to Rule 56, Fed.R.Civ.P., for the reason that Plaintiff, in response to the motions, presented matters outside the pleadings. By order dated May 18, 1979, Defendants were notified of this conversion and were given time in which to file any materials they wished the Court to consider.

Plaintiff, on June 20, 1979, filed a Motion to Strike the Brief in Support of Summary Judgment filed by Defendant Stege on the ground that it was not filed within the time allowed by the Court in its order of May 18, 1979. Defendant Stege's brief was filed some two weeks later than the time allowed. Defendant's brief is essentially a condensation of his earlier brief filed in support of his motion to dismiss; it does not appear that Defendant's untimely filing has worked in any way to prejudice the Plaintiff in this action, or that Defendant is attempting to delay this action or acting in bad faith. Although delay and failure to timely comply with orders of the Court will ordinarily not

be tolerated, the Court, in this instance finds that the interests of justice will best be served if Plaintiff's Motion to Strike is overruled.

Plaintiff herein seeks the equitable relief of having his state arrest records expunged. There is no doubt that the power to do so exists, but it is also clear that the power is only to be exercised under extreme circumstances, see, e.g. Paine v. Baker, 595 F.2d 197 (Fourth Cir. 1979); Bromley v. Crisp, 561 F.2d 1351 (Tenth Cir. 1977), cert. denied, 435 U.S. 908 (1978); United States v. Linn, 513 F.2d 925 (Tenth Cir.), cert. denied, 423 U.S. 836 (1975); United States v. Seasholtz, 376 F.Supp. 1288 (N.D.Okla. 1974).

The parties agreed at the hearing that the facts of this case are not in dispute, and the Court, after a careful examination of the record, finds that there are no questions of fact presented. On December 28, 1977 a preliminary information against Plaintiff was filed in Tulsa County alleging that Plaintiff, Jimmy D. Laster, did on or about the 12th of December, 1977 "willfully and lewdly expose his person and private parts in a place, to wit, 9820 East 29th Street, in the City of Tulsa, Tulsa County, Oklahoma and in a place where there were present other persons to be offended and annoyed thereby," a violation of Okla.Stat. tit.21, § 1021. Plaintiff was subsequently arrested, fingerprinted, booked and held to stand charge. The preliminary hearing was held on January 12, 1978, before the Honorable Dean Nichols, Special Judge. Plaintiff, at the preliminary hearing, presented and argued a Motion to Compel a Line-Up and a Motion to Suppress Evidence of Pretrial and Courtroom Identification of Defendant. These motions were overruled. The State then presented its case, calling the complaining witness, a 13-year-old junior high school student. Upon being asked whether the man she had observed exposing himself was in the courtoom, the witness responded negatively. The

State then rested, and Plaintiff's demurrer to the evidence and motion to dismiss were sustained and the case dismissed, without objection by the State.

Plaintiff's Complaint alleges that records of his arrest are now maintained by the Tulsa Police Department, that copies have been transmitted to the FBI, and that the Court Clerk of Tulsa County now maintains these records and other documents filed in connection with the case. Plaintiff contends that his arrest was illegal, not supported by probable cause and that the maintenance of these records threatens his basic civil rights, denies him equal protection of the laws, and invades his right of privacy. The Court notes that the Supreme Court has expressly rejected the argument that there is any constitutionally-based "right to privacy" in connection with arrest records, Paul v. Davis, 424 U.S. 693, 712-713 (1976). Plaintiff alleges that he is desirous of seeking and gaining membership in a fraternal organization, the application questionnaire of which asks whether he has a criminal record or has ever been arrested. Plaintiff, in his Complaint, states that he "feels that he might be denied access to said organization by reason of his prior invalid arrest record." Plaintiff asks this Court to order that Defendant Stege destroy all records maintained by the Police Department pertaining to Plaintiff's arrest and that all copies sent to the FBI be returned to Tulsa for destruction by Defendant Stege, or that the FBI be ordered to expunge its records. In this regard the Court notes that no officials of the Federal Government are named as defendants herein. Plaintiff also asks that Defendant Lamm be ordered to supervise the destruction of all pertinent files and records maintained by the District Court of Tulsa County.

Defendant Stege does not dispute that, as Chief of Police of the City of Tulsa, he is charged with the maintenance and preservation of the police records. Defendant

Stege is a proper party to this action.

Defendant Lamm, however, contends that she is not a proper party defendant, and that this action is improperly brought against her because as a Judge, she enjoys absolute immunity. Plaintiff alleges that Judge Lamm controls the court records of the Plaintiff's arrest, but Plaintiff also alleges that the District Court Clerk now maintains these records.

It is clear from the authorities that Judge Lamm's judicial jurisdiction, as Judge of the District Court, never attached to the criminal action commenced against Plaintiff in the state courts. This could have only occurred if Plaintiff had either been "bound over" or waived his preliminary hearing. Okla.Stat. tit.22, § 264; Harper v. District Court of Oklahoma County, 484 P.2d 891 (Okla.Crim. 1971); Nicodemus v. District Court of Oklahoma County, 473 P.2d 312 (Okla.Crim. 1970); Flint v. Sater, 374 P.2d 929 (Okla.Crim. 1962). This is true even though Plaintiff's case (CRF-77-3480) was administratively assigned to Judge Lamm initially. Plaintiff, however, essentially argues that it is Judge Lamm's administative authority over his case which makes her a proper party, not her judicial authority. This is a question separate and distinct from any involving the attachment of authority to determine the merits of Plaintiff's case.

Title 20, Section 95.7, Oklahoma Statutes, provides that "a judge to whom a case has been assigned has continuing authority over it . . . until its final disposition." In Oklahoma, a ruling of a magistrate on the preliminary examination which is adverse to the State is a final disposition if not appealed by the State. State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla.Crim. 1972); Rule 6.3, Rules of the Court of Criminal Appeals, Okla.Stat. tit.22, ch.18, App. It does not appear that such an appeal was sought in

connection with Plaintiff's case. The authority of the assigned judge over the case, however, is suspended when the magistrate commences to exercise his authority over the case in connection with the preliminary examination. This includes any administrative or supervisory power over the case, see Harper v. District Court of Oklahoma County, supra. In Harper, it is said:

> It will be conceded that such administrative authority as does exist, including the power to assign a case, ends over the case when the examining magistrate commences to exercise his authority in the conduct of the preliminary examination. After those proceedings are commenced, the administrative authority is "suspended" subject to the results of the preliminary examination. At the conclusion of that examination the district judge's administrative authority assumes one of two conditions: Jurisdictional or clerical direction. When the accused is bound over to stand trial, the administrative procedures established to fulfill the statutory requirements for arraignment, trial, etc., become operative. However, when the information is dismissed those procedures established for clerical direction, in the court clerk's office, become operative.

484 P.2d at 896 (emphasis added). The magistrate, upon the discharge of a defendant, is required by statute to return any record and all of the pertinent papers to the court clerk; no action is required of the assigned district judge. Okla.Stat. tit.22, § 276. The records pertinent to Plaintiff's case are now alleged by him to be held by the court clerk.

Judge Lamm asserts that she has no direct control over Plaintiff's records in that she is not the official or statutory custodian thereof. Authority over them could only vest in her through the existence of, and to the extent of, any administrative control over the court clerk, who is the actual custodian under a duty to file and preserve all court papers, see Okla.Stat. tit.12, §§ 29, 33. Under Rule 2, Rules on Administration of Courts, Okla.Stat. tit.20, ch.1, App.2, general administrative authority and supervision over all judicial personnel and court officials is vested in the

Presiding Judge. Under Rule 8 of the same Rules, each Chief Judge of a district court is invested with the power to adopt rules for the administration of the court of which he is in charge. Furthermore, it is implicit in Okla.Stat. tit.20, §§ 1002-1006 that supervisory power over the court clerk is vested in the Presiding Judge and the Chief Judge. The Court takes judicial notice of the fact that the Honorable Margaret Lamm is not the Presiding Judge of the District Court of Tulsa County, nor is she, at this time, the Chief Judge of the Criminal Division. Judicial notice of facts of public record and general knowledge which are not subject to reasonable dispute is appropriate in determining motions for summary judgment, see generally, 10 Wright & Miller § 2723, Rule 201, Fed.R.Evid.

In accordance with the foregoing authorities, this Court is of the opinion that Defendant the Honorable Margaret Lamm is not a proper party defendant, and that this complaint, as to her, should be and is hereby dismissed. In view of this conclusion, the Court finds that it need not, at this time, address the question of judicial immunity.

The Court now directs its attention to the motion for summary judgment of Defendant Stege.

The fact that the records in question in this case are maintained by the State does not put them beyond the scope of this Court's power, even though this fact does inject substantial policy considerations into any determination, e.g., Wilson v. Webster, 467 F.2d 1282 (Ninth Cir. 1972); United States v. McLeod, 385 F.2d 734 (Fifth Cir. 1967), nor does the fact that Defendant Stege is under a duty to maintain and preserve these records limit this Court's power to order their expungement, if it is found to be necessary, e.g., United States v. Benlizar, 459 F.Supp. 614 (D.D.C. 1978); Kowall v. United States, 53 F.R.D. 211 (W.D.Mich. 1971).

Plaintiff herein is not a juvenile, nor is there a pertinent statute applicable to expungement in this case. Were either of these factors present, the claim of Plaintiff would, of course, be cast in a different light. See generally, Annot., 46 A.L.R. 3d 900 (1972), and the cases collected therein. Under the circumstances presented by this case, however, the Court must decide whether expungement is warranted by balancing the harm caused to the individual by the existence of these records against the State's interest in maintaining them, e.g., Bromley v. Crisp, supra; Paton v. LaPrade, 524 F.2d 862 (Third Cir. 1975); United States v. Benlizar, supra; United States v. Seasholtz, supra.

As has been already stated, though the power to order expungement exists, it is confined to an extremely narrow scope and is to be exercised only under extraordinary and extreme circumstances. Paine v. Baker, supra; United States v. Schnitzer, 567 F.2d 536 (Second Cir. 1977), cert. denied, 435 U.S. 907 (1978); United States v. Linn, supra. Whether expungement is appropriate in any particular case is dependent upon the specific circumstances. Where arrests were made clearly for purposes of harrassment, where gross government misconduct was present, where mass arrests were involved, or where the statute under which the arrests were made was unconstitutional, expungement has been found to be warranted, e.g., Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973) (arrest of 14,517 "May Day" demonstrators); United States v. McLeod, supra (arrests to intimidate blacks who were encouraging others to vote); United States v. Benlizar, supra (serious unconstitutional actions by DEA); Bilick v. Dudley, 356 F.Supp. 945 (S.D.N.Y. 1973) (87 students arrested at a party held by a political organization); Wheeler v. Goodman, 306 F.Supp. 58 (W.D.N.C. 1969), vacated, 401 U.S. 987 (1971) (unconstitutional vagrancy statute; police misconduct); Hughes v. Rizzo, 282

F.Supp. 881 (E.D.Pa. 1968) (minors arrested because they were "hippies").

It is the existence of special and unusual circumstances which makes the remedy of expungement applicable; the mere fact that an arrest did not result in a conviction is insufficient because the arrest record is a defect-less historical fact, United States v. Schnitzer, supra; United States v. Benlizar, supra, nor can the arrested party's fear and speculation that his records will be improperly disseminated or misused, in itself supply the basis for expungement, United States v. Linn, supra. The Court must assume that the records will reflect the final disposition of the case, United States v. Seasholtz, supra.

The facts of the present case reveal that Plaintiff was arrested after the preliminary information was filed as a result of a citizen's complaint. Plaintiff's motion to suppress contended that the conduct of the police in presenting photographs of various individuals to the complaining witness was impermissibly suggestive, resulting in the likelihood of misidentification. This motion was argued prior to the preliminary hearing, and both the complaining witness and a city detective testified as to the procedure followed in conducting the photographic line-up. As has been previously stated, this motion was overruled by the Special Judge. At the preliminary hearing which immediately followed, the complaining witness was unable to positively identify Plaintiff as the man she had seen exposing himself, and the case was dismissed. The fact that the complaining witness was unable to identify the Plaintiff at the preliminary hearing, while she apparently was able to pick his photograph out of an array does not, standing alone, provide the extraordinary circumstances necessary to allow this Court to interfere with the record-keeping procedures of the State.

Plaintiff has shown no evidence of egregious police misconduct, harassment, or that his arrest was plainly illegal. The Court does not find the circumstances of this case to be appropriate for the application of the remedy of expungement. United States v. Linn, supra; United States v. Seasholtz, supra.

Were these records maintained solely by federal law enforcement agencies and federal courts, a different situation would perhaps be presented, but the fact that these records are maintained by an arm of the State and its courts, makes this a situation in which the federal court should only interfere where the reasons for doing so are clear and compelling. As the court in Tarlton v. Saxbe, 507 F.2d 1116 (D.C.Cir. 1974) noted,

> The District Court cannot review the constitutionality and relitigate the merits of all the arrests and convictions in the United States. Furthermore, considerations of federal-state comity would seem to require that local courts which supervised the arrest or entered the conviction under attack should make the initial determination as to the validity of that arrest or conviction. (Footnotes omitted).

507 F.2d at 1127-1128. In the extensive footnote at 507 F.2d 1128, n.34, the Tarlton court also recognized that "[s]ince the expungement of arrest or conviction records is a form of collateral attack, the habeas corpus case law on exhaustion of state remedies, is a particularly persuasive, if not controlling, analogy." See also Menard v. Saxbe, 498 F.2d 1017 (D.C.Cir. 1974) at 1026, where the court recognized that in these situations, "a call on cognizant Federal courts" is proper "when administrative remedy is unavailing." Plaintiff herein has taken no formal steps to attempt to have the state records in question expunged by the proper state authorities. Even though the case itself is not factually applicable here, the underlying policy considerations of Younger v. Harris, 401 U.S. 37 (1971) cannot be ignored. See also, Rizzo v. Goode, 423 U.S. 362, 377-380

(1976), where the Court urged lower federal courts to be "constantly mindful of the special delicacy of the adjustment to be preserved between Federal equitable power and State administration of its own law," and Wheeler v. Goodman, supra, which was vacated and remanded for reconsideration in light of Younger v. Harris. The Court finds that sufficiently compelling reasons do not exist so as to enable this Court to order that the records pertaining to Plaintiff's arrest be expunged, especially in view of the well-founded reluctance of federal courts to act in the absence of extreme circumstances when questions of state-federal comity are involved. It is therefore appropriate that judgment be granted in favor of Defendant Harry Stege and against Plaintiff Jimmy D. Laster.

The Court, therefore, concludes that Plaintiff's motion to strike the brief of Defendant Stege in support of summary judgment be and hereby is overruled, that the complaint be dismissed as against Defendant the Honorable Margaret Lamm, in that as to her, it fails to state a claim upon which relief can be granted, and that judgment be entered in favor of Defendant Harry Stege and against Plaintiff Jimmy D. Laster.

It is so Ordered this 2nd day of October, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIMMY D. LASTER,

Plaintiff,

vs.

HARRY STEGE, Chief of Police, Tulsa Police Department; THE HONORABLE MARGARET LAMM, Judge of the District Court, Criminal Division, Tulsa County, Oklahoma,

Defendants.

No. 79-C-116-D

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

The Court, after hearing and thorough consideration of the entire file in this matter, finds that there are no material issues of fact in existence, and that as a matter of law judgment should be entered in favor of Defendant Harry Stege.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment in this cause be granted in favor of Defendant Harry Stege and against Plaintiff Jimmy D. Laster.

It is so Ordered this 2nd day of October, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE A. MORETZ,

Plaintiff,

vs.

CUSTOM BRICK COMPANY, an Oklahoma Corporation,

Defendant.

No. 79-C-143-C

THE BRICK TRUST, an Express Trust,

Third Party Plaintiff,

vs.

GEORGE A. MORETZ,

Defendant.

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

THIS MATTER having come on to be heard upon Motion of the Plaintiff for an Order Dismissing the Complaint with prejudice to further action, the court finds that the parties have settled all their respective claims and that the matter should be dismissed.

It is, Therefore, ORDERED, ADJUDGED and DECREED that the Plaintiff's Complaint against Custom Brick Company, an Oklahoma corporation, be dismissed with prejudice to further action.

Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE A. MORETZ,

Plaintiff,

vs.

CUSTOM BRICK COMPANY, an Oklahoma Corporation,

Defendant.

THE BRICK TRUST, an Express Trust,

Third Party Plaintiff,

vs.

GEORGE A. MORETZ,

Defendant.

No. 79-C-143-C

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISMISSING COMPLAINT IN INTERVENTION WITH PREJUDICE

THIS MATTER having come on to be heard upon Motion of the Third Party Plaintiff, The Brick Trust, an Express Trust, for an Order Dismissing the above styled action with prejudice, the court finds that all parties have settled their respective claims and the matter should be dismissed.

It is, therefore, ORDERED, ADJUDGED and DECREED, that the third party Complaint in Intervention filed by The Brick Trust against the plaintiff George A. Moretz, is hereby dismissed with prejudice to any further action.

Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

Plaintiff,

-vs-

No. 78-C-493-C

GREGORY TODD DANIEL and
SAM D. McCLAIN,

Defendants.

FILED
OCT 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISMISSING CAUSE

NOW on this 2nd day of ~~September~~ October, 1979, comes on for hearing the Motion to Dismiss without prejudice filed by Plaintiff.

AND it appearing to said Court that said cause should be dismissed in view of the fact that Case No. CT-78-688 in the Distrct Court of Tulsa County, Oklahoma, has now been dismissed, rendering this lawsuit moot.

IT IS THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that this cause be, and the same is hereby, dismissed without prejudice.

(Signed) H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SAM E. WOMBLE,

Plaintiff,

vs.

ARMCO INC. (formerly named ARMCO STEEL CORPORATION), a foreign corporation; UNITED STEELWORKERS OF AMERICA, a labor organization,

Defendant.

77-C-284-C

FILED
OCT 1 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Order entered this date, IT IS ORDERED that Judgment be entered in favor of the defendant, Armco Inc., and against the plaintiff, Sam E. Womble.

ENTERED this 1st day of October, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONNE W. PITMAN, and MARY KATHRYN CHAPMAN, Executors of the Estate of H. A. CHAPMAN, Deceased, d/b/a H. A. CHAPMAN INVESTMENTS,	)	
Plaintiffs,	)	
vs.	)	No. 76-C-642-C
AMF TUBOSCOPE, INC.,	)	
Defendant.	)	

FILED
OCT 1 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

The Court on october 1, 1979, filed its Supplemental Findings of Fact and Conclusions of Law which, along with the Findings of Fact and Conclusions of Law filed November 8, 1977, are hereby incorporated herein and made a part of its judgment.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered in favor of the plaintiffs, Donne W. Pitman and Mary Kathryn Chapman, Executors of the Estate of H. A. Chapman, d/b/a H. A. Chapman Investments, and against the defendant AMF Tuboscope, Inc., and that the total damages be entered in favor of the plaintiffs, and against the defendant in the amount of $533,290.50, in light of this Court's Findings of Fact and Conclusions of Law, and its Supplemental Findings of Fact and Conclusions of Law.

It is so Ordered this 1st day of october, 1979.

H. Dale Cook

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	78-C-541-C
	)	
RUFFIS A. TURNAGE,	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the Order entered this date, IT IS ORDERED THAT Judgment be entered in favor of the plaintiff and against the defendant, Ruffis A. Turnage, in the sum of $1,113.25, plus interest of $297.74 as of September 6, 1978, plus interest from and after said date at the rate of 7% per annum.

ENTERED this 1st day of October, 1979.

H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BATES, PHILLIP LEE, et al, Plaintiffs,	)	
vs.	)	No. 79-C-455-D
NATIONAL ZINC COMPANY, INC., a corporation, et al, Defendants.	)	

FILED
OCT 1 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

NOTICE OF DISMISSAL

TO: National Zinc, a corporation; THOMAS L. VOGT, individually and as President of NATIONAL ZINC COMPANY, INC.; ENGELHARD MINERALS AND CHEMICAL CORPORATION, a corporation; MARK KAPLAN, individually and as President of ENGELHARD MINERALS AND CHEMICAL CORPORATION, Defendants
and
WILLIAM C. ANDERSON and STEPHANIE K. SEYMOUR, Doerner, Stuart, Saunders, Daniel & Anderson, their attorneys.

Notice is hereby given that whereas the above-entitled action was commenced on July 2, 1979, and whereas defendants have filed neither an answer nor a motion for summary judgment herein, plaintiffs hereby dismiss the above-entitled action without prejudice.

The Clerk of the above-entitled Court is hereby requested to enter this Dismissal in the records of the Court.

DATED the 1 day of September, 1979.

W. L. STEGER
Attorney at Law
1140 N.W. 63rd Street
Glenbrook Center, Suite 514
Oklahoma City, Oklahoma 73116

GEORGINA E. LANDMAN
Williams, Landman & Savage
Attorneys at Law
324 Main Mall, Suite 600
Tulsa, Oklahoma 74103

WILLIAM C. SELLERS
Attorney at Law
Security Building, Suite 202
Sapulpa, Oklahoma

HOPKINS, WARNER & KING, INC.
Attorneys at Law
1502 South Boulder, Suite 108
Tulsa, Oklahoma 74119

By _____
DALE WARNER

CERTIFICATE OF SERVICE

This is to certify that on this 1 day of September, 1979, a true, correct and exact copy of the above and foregoing NOTICE OF DISMISSAL was mailed to William C. Anderson and Stephanie K. Seymour of the firm of Doerner, Stuart, Saunders, Daniel & Anderson, 1200 Atlas Life Building, Tulsa, Oklahoma 74103, with sufficient postage thereon having been fully prepaid.

_____
DALE WARNER